

DEC 7 1968

JOHN F. DAVIS, CLERK

APPENDIX

Supreme Court of the United States

October Term, 1968

No. 413

STATE OF NORTH CAROLINA,

WARDEN R. L. TURNER,

Petitioner

vs.

CLIFTON A. PEARCE,

Respondent.

**ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT**

**PETITION FOR CERTIORARI FILED AUGUST 16, 1968
CERTIORARI GRANTED OCTOBER 28, 1968**

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Supreme Court of the United States

October Term, 1968

No. 413

STATE OF NORTH CAROLINA,

WARDEN R. L. TURNER,

Petitioner

vs.

CLIFTON A. PEARCE,

Respondent.

RELEVANT DOCKET ENTRIES

- (1) June 16, 1966. Judgment in the case of STATE v. CLIFTON A. PEARCE, 6 June 1966, Two-Week Criminal Conflict Session, Superior Court of Durham County, Durham, North Carolina.
- (2) November 3, 1966. Docketing of Appeal in the Supreme Court of North Carolina in the case of STATE v CLIFTON A. PEARCE, from the Two-Week Criminal Conflict Session, Superior Court of Durham County, Durham, North Carolina.
- (3) December 14, 1966. Opinion of the Supreme Court of North Carolina in the case of STATE v CLIFTON A. PEARCE, affirming the trial and judgment of the appeal in said case from the Superior Court of Durham County, Durham, North Carolina.
- (4) March 7, 1967. Application by Clifton A. Pearce for Writ of Habeas Corpus and Affidavit in Forma Pauperis

filed in the United States District Court for the Eastern District of North Carolina, Raleigh Division, Raleigh, North Carolina.

- (5) March 20, 1967. Return to Habeas Corpus and Return to Show Cause filed by the respondent, State of North Carolina in the case of STATE v CLIFTON A. PEARCE, in the United States District Court for the Eastern District of North Carolina, Raleigh Division, Raleigh, North Carolina.
- (6) March 28, 1967. Proof of Service and Answer for Respondents, State of North Carolina, and Warden R. L. Turner, in opposition to Petition for Writ of Habeas Corpus and Answer to Petition and Motion to Dismiss filed by the respondents in the case of CLIFTON A. PEARCE v STATE OF NORTH CAROLINA, WARDEN R. L. TURNER, in the United States District Court for the Eastern District of North Carolina, Raleigh Division, Raleigh, North Carolina.
- (7) November 20, 1967. Memorandum Opinion and Order signed by Algernon L. Butler, United States District Judge, in the case of CLIFTON A. PEARCE v STATE OF NORTH CAROLINA, WARDEN R. L. TURNER, No. C-1973.
- (8) November 30, 1967. Memorandum Opinion and Order signed by James H. Pou Bailey, North Carolina Superior Court Judge, in the case of STATE OF NORTH CAROLINA v CLIFTON A. PEARCE, in the Superior Court of Durham County, Durham, North Carolina.
- (9) February 2, 1968. Writ of Habeas Corpus signed by Algernon L. Butler, United States District Judge, in the case of CLIFTON A. PEARCE v STATE OF NORTH CAROLINA, WARDEN R. L. TURNER, No. C-1973.
- (10) March 1, 1968. Notice of Appeal to the United States Court of Appeals for the Fourth Circuit filed by the State of North Carolina and Warden R. L. Turner.
- (11) June 19, 1968. Opinion of the United States Court of

Appeals for the Fourth Circuit, in the case of CLIFTON A. PEARCE v STATE OF NORTH CAROLINA and WARDEN R. L. TURNER, No. 12,256.

- (12) June 19, 1968. Judgment of the United States Court of Appeals for the Fourth Circuit in the case of CLIFTON A. PEARCE v STATE OF NORTH CAROLINA and WARDEN R. L. TURNER.
- (13) June 28, 1968. Motion of the State of North Carolina and Warden R. L. Turner for Stay of Mandate pending certiorari filed in the United States Court of Appeals for the Fourth Circuit.
- (14) July 10, 1968. Order of the United States Court of Appeals for the Fourth Circuit Staying Mandate pending application of the State of North Carolina and Warden R. L. Turner for certiorari.
- (15) August 16, 1968. Petition for Certiorari filed in the Supreme Court of the United States by the State of North Carolina and Warden R. L. Turner.
- (16) October 28, 1968. Certiorari granted.

JUDGMENT IN THE CASE OF STATE v. CLIFTON A. PEARCE, 6 JUNE 1966, TWO-WEEK CRIMINAL CONFLICT SESSION, DURHAM SUPERIOR COURT

On Thursday morning, June 16, 1966, the following judgment was entered by the Court:

THE COURT: It is the intention of this Court to give the defendant a sentence of fifteen years in the State Prison; however, it appears to the Court from the records available from the Prison Department that the defendant has served 6 years, 6 months and 17 days flat and gain time combined, and the Court in passing sentence in this case is taking into consideration the time already served by the defendant. **IT IS THE JUDGMENT** of this Court that the defendant be confined to the State's Prison for a period of eight years.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION
NO. 1973 CIVIL

CLIFTON A. PEARCE

v.

ORDER

STATE OF NORTH CAROLINA,
WARDEN R. L. TURNER

THIS CAUSE coming on to be heard upon the application of Clifton A. Pearce, a state prisoner, for a writ of habeas corpus, the court finds the following facts:

That the petitioner was convicted by a jury at the May, 1961 term of the Superior Court of Durham County, of assault with intent to commit rape and was given a sentence of 12 to 15 years; that the petitioner sought post-conviction relief and was awarded a new trial by the Supreme Court of North Carolina¹ because of the use of an involuntary confession at his original trial; that petitioner was retried at the June, 1966 term of the Superior Court of Durham County, and convicted by a jury of assault with intent to commit rape; that in sentencing petitioner at the new trial, the trial judge stated that it was his intention to give the petitioner a sentence of fifteen years, but he was taking into consideration the time already served, and therefore sentenced him to eight years; that the petitioner appealed his conviction to the North Carolina Supreme Court² which affirmed his conviction; that the petitioner sought a post-conviction hearing in February of 1967 which was denied.

Petitioner alleges, *inter alia*, that he received a harsher sentence at his retrial and therefore the second sentence is void under the decision of *Patton v. State of North Carolina*.³ With this contention we must agree. The eight year sentence

petitioner received at his second trial gives him more than full credit for time served on the maximum length of the original sentence, but it does not give full credit on the minimum length of the original sentence.⁴ Now therefore, based upon the present record before this court, it is ORDERED AND ADJUDGED:

(1) That the sentence imposed on Clifton A. Pearce at the June 1966 session of the Superior Court of Durham County upon his conviction of assault with intent to commit rape is unconstitutional and void.

(2) That the State of North Carolina file in the office of the Clerk of this court in the Federal Building, Raleigh, North Carolina, within ten days after service of this order, a statement certifying whether or not said State elects to resentence the petitioner, Clifton A. Pearce.

(3) That the State of North Carolina proceed to resentence said Clifton A. Pearce within sixty days from the date of service of this order if said State should elect to resentence him.

(4) That if the State of North Carolina does not elect to resentence said petitioner, or if said State should elect to resentence him and fail to do so within the sixty (60) days prescribed, this court will entertain a motion on behalf of the petitioner for an order releasing him from all restraint imposed by virtue of the sentence of eight years imprisonment imposed at the June 1966 session of the Superior Court of Durham County upon his conviction of assault with intent to commit rape.

(5) That the United States Marshal serve forthwith a copy of this order upon the Honorable Dan K. Edwards, Solicitor of the Tenth Solicitorial District of North Carolina, Durham, North Carolina; and the Honorable V. Lee Bounds, Director of the North Carolina Department of Correction, Raleigh, North Carolina; that the Clerk shall serve a copy of this order by mail upon the Honorable T. Wade Bruton, Attorney General of North Carolina, Raleigh, North Carolina, and the petitioner, Clifton A. Pearce.

This November 17, 1967.

/s/ Algernon L. Butler
Chief Judge, U. S. District Court

A True Copy, Teste:
Samuel A. Howard, Clerk

By Norma G. Blackman
Deputy Clerk

¹ State of North Carolina v. Clifton A. Pearce, 266 N.C. 234, 145 S.E. 2d 918.

² State of North Carolina v. Clifton A. Pearce, 268 N.C. 707, 151 S.E. 2d 571.

³ Patton v. State of North Carolina, 381 F. 2d 636 (1967).

⁴ Patton v. Ross, 267 F. Supp. 387 (E.D.N.C. 1967), Hall v. Stallings, Civ. No. 1811, Raleigh Division (E.D.N.C. 1967).

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of November, 1967, I served a copy of the foregoing order upon the Honorable T. Wade Bruton, Attorney General of North Carolina, Raleigh, North Carolina, and a copy upon the petitioner, Clifton A. Pearce, North Carolina Central Prison, 835 West Morgan Street, Raleigh, North Carolina, by depositing the same in the United States mail, postage prepaid, in envelopes addressed respectfully to each at their respective addresses.

SAMUEL A. HOWARD, Clerk
United States District Court

By Norma G. Blackman
Deputy Clerk

NORTH CAROLINA
DURHAM COUNTY

IN THE
SUPERIOR COURT

STATE OF NORTH CAROLINA)

v.)

CLIFTON A. PEARCE)

ORDER

This cause comes on to be heard pursuant to an Order dated the 17th of November, 1967 filed the 20th of November, 1967 in the United States District Court, Eastern District of North Carolina, and signed by the Honorable Algernon L. Butler, Chief Judge, United States District Court, Eastern District of North Carolina. The said Order provides as follows:

(1) That the sentence imposed on Clifton A. Pearce at the June 1966 Session of the Superior Court of Durham County upon his conviction of assault with intent to commit rape is unconstitutional and void.

(2) That the State of North Carolina file in the office of the Clerk of this Court in the Federal Building, Raleigh, North Carolina, within ten days after service of this Order a statement certifying whether or not said State elects to resentence the petitioner, Clifton A. Pearce.

(3) That the State of North Carolina proceed to resentence said Clifton A. Pearce within sixty days from the date of service of this Order if said State should elect to resentence him.

(4) That if the State of North Carolina does not elect to resentence said petitioner, or if said State should elect to resentence him and fail to do so within the sixty (60) days prescribed, this Court will entertain a motion on behalf of the petitioner for an order releasing him from

all restraint imposed by virtue of the sentence of eight years imprisonment imposed at the June 1966 Session of the Superior Court of Durham County upon his conviction of assault with intent to commit rape.

(5) That the United States Marshal serve forthwith a copy of this Order upon the Honorable Dan K. Edwards, Solicitor of the Tenth Solicitorial District of North Carolina, Durham, North Carolina; and the Honorable V. Lee Bounds, Director of the North Carolina Department of Correction, Raleigh, North Carolina; that the Clerk shall serve a copy of this Order by mail upon the Honorable T. Wade Bruton, Attorney General of North Carolina, Raleigh, North Carolina, and the petitioner, Clifton A. Pearce.

An examination of the records relating to this case discloses the following:

That the defendant Pearce was indicted by the Grand Jury upon the capital charge of rape of a 12-year-old girl. He was tried by a jury at the May 1961 Session of the Superior Court of Durham County and was convicted of assault with intent to commit rape and was sentenced to twelve to fifteen years in the State's prison. Upon the same day he was transferred to Central Prison in Raleigh. That thereafter the petitioner sought post-conviction relief and was awarded a new trial by the Supreme Court of North Carolina, 266 N.C. 234; 145 S.E. 2d 918. That thereafter the petitioner was retried upon a new bill of indictment charging the petitioner with the crime of assault with intent to commit rape, the said bill of indictment having been returned at the March 1966 Session of Superior Court of Durham County. He was again convicted by a jury. At this second trial in passing sentence upon the defendant Pearce, the Trial Judge entered this judgment: "It is the intention of this Court to give the defendant a sentence of fifteen years in the State Prison; however, it appears to the Court from the record available from the Prison Department that the defendant has served six years, six months, and seventeen days, flat and gain time combined, and the Court

in passing sentence in this case is taking into consideration the time already served by the defendant. It is the judgment of this Court that the defendant be confined in the State's prison for a period of eight years." That this conviction was appealed to the North Carolina Supreme Court. One of the questions raised on his appeal was his contention that the sentence given him at the second trial was in excess of that given him at his first trial. The Supreme Court of North Carolina affirmed his conviction. (268 N.C. 707; 151 S.E. 2d 571). Thereafter the petitioner sought by post-conviction hearing a new trial, which was denied.

The maximum punishment for the felony of assault with intent to commit rape in North Carolina is fifteen years.

The Court concludes the facts and the law in this case to be as follows:

~~The sentence at the second trial has been held by the Supreme Court of North Carolina to be properly and lawfully imposed under the law.~~

In this case the Federal District Court on a writ of habeas Corpus appears to assert that it will directly overrule the highest appellate court in the State of North Carolina on a specific question presented to and passed upon by the Supreme Court of North Carolina.

The Superior Court of North Carolina is the only Court in the State with the authority to sentence a person convicted for the felony of assault with intent to commit rape.

In this case the Federal District Court on a writ of habeas corpus is attempting by its Order to require the Superior Court of North Carolina to overrule the Supreme Court of North Carolina, and the Superior Court of North Carolina does not have such authority or power.

The writ of habeas corpus may not be used as a substitute for an appeal or writ of error.

Except for the original jurisdiction of the United States Supreme Court which flows directly from the Constitution, two prerequisites to jurisdiction must be present in the Federal Courts. First, the Constitution must have given the Courts the capacity to receive it, and second, an act of Congress must have conferred it.

There is no act of Congress conferring upon a Federal District Court the authority, the power, or the jurisdiction to require the Superior Court of the State of North Carolina to act in this matter.

There is no act of Congress conferring upon a Federal District Court the authority, the power, or the jurisdiction to direct the Superior Court of the State of North Carolina to act in opposition to a ruling of the Supreme Court of North Carolina.

This Court will not take or attempt to take action in direct contravention of the ruling of the Supreme Court of North Carolina.

The grounds upon which the Federal District Court is so ruling, or asserting that it will act is that a greater sentence was imposed upon a second trial. The Supreme Court of the United States has not ruled that this is unconstitutional. At least two of the United States Circuit Courts of Appeals have ruled in the following language: "A trial judge, when a new trial is ordered, may impose a sentence greater than one he had earlier vacated, and it is unnecessary to articulate the reason for any differentiation in the term of the sentence."

The Order of the Federal District Court concedes that the petitioner is properly subject to imprisonment for his crime, and the Order of the Federal District Court (which is threatened in the present Order to be issued in sixty (60) days) which might result in the immediate release of the prisoner will be entirely contrary to law, and contrary to the proper administration of justice.

A copy of this Order is directed to be mailed to the following: Honorable V. Lee Bounds, Director, North Carolina Department of Correction; Honorable T. Wade Bruton, Attorney General of North Carolina; and Honorable Dan K. Edwards, Solicitor of the Tenth Solicitorial District.

This the 30th day of November, 1967.

James H. Póu Bailey
Judge Presiding

UNITED STATES DISTRICT COURT
 EASTERN DISTRICT OF NORTH CAROLINA
 RALEIGH DIVISION
 No. 1973 — Civil

Clifton A. Pearce :

v. :

Writ of Habeas Corpus

State of North Carolina, :
 Warden R. L. Turner :

This cause coming on to be heard upon motion of Clifton A. Pearce for an order releasing him from restraint imposed by virtue of the sentence of eight years imprisonment imposed at the June 1966 session of the Superior Court of Durham County upon his conviction of assault with intent to commit rape, and it appearing that an order was entered by this court on November 20, 1967, adjudging the said sentence imposed at the June 1966 session of the Superior Court of Durham County to be unconstitutional and void, and allowing the State of North Carolina sixty (60) days within which to impose a constitutional sentence, and providing further that if the State should fail to resentence the petitioner within the sixty (60) days prescribed, this court would entertain a motion on behalf of the petitioner for an order releasing him from all restraint imposed by virtue of said sentence; and it further appearing to the court that on November 30, 1967, the Superior Court of Durham County entered an order electing not to resentence the petitioner in accordance with the option granted by this court, and that said period of sixty (60) days has expired; that the court is of the opinion that the State of North Carolina has been afforded a reasonable opportunity within the sixty (60) days prescribed to resentence petitioner to a maximum term of imprisonment of not less than 12 nor more than 15 years in the State's prison, subject to credit for the time served on the prior invalidated sentence; that if the State had elected to resentence and to impose the maximum constitutional sentence,

after allowance of the required credit, there would still remain approximately six years of petitioner's sentence yet to be served; that this court is reluctant to release petitioner until he has fully paid his debt to society, but it is left with no alternative; that the petitioner's present sentence has been adjudged unconstitutional and void, and the State has refused to impose a constitutional and valid sentence; Now, therefore,

It is ORDERED AND ADJUDGED as follows:

(1) That the respondents release immediately Clifton A. Pearce from all restraint imposed by virtue of the sentence of eight years imprisonment imposed at the June 1966 session of the Superior Court of Durham County, North Carolina, upon his conviction of assault with intent to commit rape.

(2) That the United States Marshal serve forthwith a copy of this order upon the Honorable Dan K. Edwards, Solicitor of the Tenth Solicitorial District of North Carolina, Durham, North Carolina, the Honorable V. Lee Bounds, Director of the North Carolina Department of Correction, Raleigh, North Carolina; that the Clerk shall serve a copy of this order by mail upon the Honorable T. Wade Bruton, Attorney General of North Carolina, Raleigh, North Carolina, the petitioner; Clifton A. Pearce, and the respondent, R. L. Turner, Warden of Central Prison.

(3) That the effectiveness of this writ is stayed for a period of thirty (30) days from the date of service hereof to permit the respondents to appeal if they be so advised.

This 1st day of February, 1968.

Algernon L. Butler
Chief Judge, United States District Court

A True Copy, Teste:
Samuel A. Howard, Clerk

By Joyce W. Todd
Deputy Clerk

CERTIFICATE OF SERVICE

I have this date _____, 1968, served a certified copy of the above writ upon the Honorable Dan K. Edwards, Solicitor of the Tenth Solicitorial District of North Carolina, Durham, North Carolina, and the Honorable V. Lee Bounds, Director of the North Carolina Department of Correction, Raleigh, North Carolina.

United States Marshal

I have this date February 2, 1968, served a copy by mail upon the Honorable T. Wade Bruton, Attorney General of North Carolina, Raleigh North Carolina, the petitioner, Clifton A. Pearce, and the respondent, R. L. Turner, Warden of Central Prison, Raleigh, North Carolina.

Samuel A. Howard, Clerk

Joyce W. Todd
Deputy Clerk, U. S. District Court

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 12,256.

Clifton A. Pearce,
Appellee,

versus

State of North Carolina and Warden R. L. Turner,
Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF NORTH CAROLINA, AT RALEIGH.
ALGERNON L. BUTLER, CHIEF JUDGE.

(Submitted June 10, 1968. Decided June 19, 1968.)

Before HAYNSWORTH, Chief Judge, and BRYAN and WINTER, Circuit Judges.

T. W. Bruton, Attorney General of North Carolina, Andrew A. Vanore, Jr., and Dale Shepherd, Staff Attorneys, Office of the Attorney General of North Carolina, on brief for Appellants, and Larry B. Sitton (Court-assigned counsel) and Smith, Moore, Smith, Schell & Hunter on brief for Appellee.

PER CURIAM:

The district court issued a writ of habeas corpus and ordered the release of petitioner for the reason that he had served the maximum term imposed on him at his original trial notwithstanding that on retrial, after successful post-conviction attack, he was sentenced to a longer term. The action was taken on the authority of our decision in *Patton v. North Carolina*, 381 F.2d 636 (4 Cir. 1967), *cert. den.*, *North Carolina v. Patton*, 390 U.S. 905 (1968).

In this appeal, the State of North Carolina frankly asks us to reconsider our decision in *Patton* in the light of cases considered therein which reached a contrary conclusion and subsequent decisions which have failed to follow it. This we decline to do; and because the issue on appeal is so narrow, we concluded to dispense with oral argument.

On the authority of *Patton*, the order of the district court is

Affirmed.

J U D G M E N T

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 12,256.

Clifton A. Pearce,

Appellee,

vs.

State of North Carolina and Warden R. L. Turner,

Appellants.

Appeal from the *United States District Court for the - - - Eastern - - - District of - - - North Carolina.*

This cause came on to be heard on the record from the United States District Court for the - - - Eastern - - - District of - - - North Carolina - - -, and was submitted on briefs.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed with costs.

Harrison L. Winter
United States Circuit Judge.

Filed June 19, 1968

Samuel W. Phillips, Clerk

A True Copy, Teste:

Samuel W. Phillips, Clerk

By: Eleanor B. Howe, Deputy Clerk

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 12,256

CLIFTON A. PEARCE,

Appellee

v.

STATE OF NORTH CAROLINA,
WARDEN R. L. TURNER,

Appellant

MOTION FOR STAY OF MANDATE

NOW COMES the Attorney General of the State of North Carolina, counsel for appellants State of North Carolina and Warden R. L. Turner herein, and respectfully shows the Court that on June 19, 1968 this Court filed an opinion affirming the District Court's finding that constitutional error had been committed in the sentence petitioner received at his retrial after his first trial had been set aside; that counsel for appellants State of North Carolina and Warden R. L. Turner intends to prepare and file in the United States Supreme Court a petition for a Writ of Certiorari for the purpose of obtaining a review of the constitutional questions decided adversely to appellants in this Court.

WHEREFORE, counsel for the State of North Carolina and Warden R. L. Turner prays that this Court stay-issuance of the mandate in this case, until such time as the Supreme Court of the United States shall render a decision upon the petition for Certiorari, and in the event that the writ of Certiorari is allowed by that Court, until the opinion of the Supreme Court of the United States is certified to this Court.

Respectfully submitted,

T. W. BRUTON
Attorney GeneralAndrew A. Vanore, Jr.
Staff Attorney

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 12,256.

Clifton A. Pearce,

Appellee,

vs.

State of North Carolina and
Warden R. L. Turner,

Appellant.

Appeal from the United States District Court for the Eastern
District of North Carolina, at Raleigh.

Upon the motion of the appellants by their counsel, and
for cause shown,

It is ordered that the mandate be, and it is hereby, stayed
pending application of the appellants in the Supreme Court
of the United States for a writ of certiorari to this Court,
provided the application is filed in the said Supreme Court
within 30 days from July 19, 1968.

/s/ Clement F. Haynsworth, Jr.
Chief Judge, Fourth Circuit

Filed July 10, 1968
Samuel W. Phillips, Clerk

A True Copy, Teste:
Samuel W. Phillips, Clerk
By: Margaret P. Atkins
Deputy Clerk

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DEC 11 1968

JOHN F. DAVIS, CLERK

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1968

No. 418

**CURTIS M. SIMPSON, Warden, Kilby Prison,
Montgomery, Alabama,**

Petitioner,

—v.—

WILLIAM S. RICE,

Respondent.

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

**PETITION FOR CERTIORARI FILED AUGUST 19, 1968
CERTIORARI GRANTED NOVEMBER 12, 1968**

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**Chronological List of Dates on Which Pleadings Were
Filed, Hearing Held and Orders Entered**

1. Order Granting Motion to File Application for Writ
of Habeas Corpus—filed July 17, 1967
2. Petition for a Writ of Habeas Corpus—received July
13, 1967
3. Return and Answer—filed August 3, 1967
4. Order Denying Motion to Dismiss—filed August 4,
1967
5. Order Discharging Petitioner from Custody—filed
September 26, 1967
6. Hearing on the Merits—filed October 6, 1967

Order

[Filed July 17, 1967]

IN THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION
Civil Action No. 2583-N

WILLIAM S. RICE,

Petitioner,

versus

CURTIS M. SIMPSON, Warden, Kilby Prison,
Montgomery, Alabama,

Respondent.

Petitioner now presents to this Court his application for a writ of habeas corpus. He alleges that in the Circuit Court of Pike County, Alabama, in February 1962, upon his pleas of guilty in state Court criminal cases Nos. 6427, 6428 and 6429, he was sentenced by said state Court to an aggregate of eight years in the state penitentiary. Petitioner alleges, further, that in August 1964 his pleas, and the judgment and sentence thereon in each of said state Court cases, were set aside upon his application, and the proof offered in support thereof, for the writ of error coram nobis. The petition now presented to this Court further avers that in December 1964 he was retried and,

upon conviction in the same circuit Court, was sentenced to a term of ten years in case No. 6427, ten years in case No. 6428, and in May 1965, after a conviction, was sentenced to a term of five years in case No. 6429. Thus, the sentences, after petitioner was successful in his coram nobis proceeding and after he was retried and convicted, now aggregate twenty-five years.

Petitioner alleges that, in resentencing him, the Circuit Court of Pike County failed to give him credit for prior time served on the original sentences, and he alleges, further, that the sentences resulting in his present incarceration that were imposed by the Circuit Court of Pike County, Alabama, in December 1964 and May 1965, which sentences aggregate over three times the aggregate sentences originally imposed in said cases, violate his constitutional rights in that said greater sentences constitute punishment for his having exercised and been successful in his post-conviction coram nobis proceeding. Petitioner alleges that it is constitutionally impermissible for the State of Alabama to force upon him the risk (here, a reality) of more severe punishment as a penalty for his having exercised and been successful in Alabama post-conviction proceedings.

Petitioner very candidly admits that he has not presented this issue to the Courts of the State of Alabama since he was reconvicted and resentenced by the Circuit Court of Pike County, Alabama, in December 1964 and May 1965. He argues, instead, that his case is one of "exceptional circumstances" in that there is an absence of available state corrective processes in his case.

Upon an examination of the petition as now presented and the excellently written argument filed in support thereof, this Court is of the opinion that petitioner is afforded

no post-conviction remedies by the State of Alabama where his only contentions, in support of his claim that his present incarceration is unconstitutional, are (1) that he was not given credit on resentencing for prior time served upon sentences which were later set aside by the Courts of the State of Alabama as being unconstitutional, and (2) that the sentences resulting in his present incarceration were imposed as, and serve as, punishment for his having exercised and been successful in Alabama post-conviction proceedings. In this connection, Judge Cates, speaking for the Alabama Court of Appeals in *Aaron v. State*, 192 So. 2d 456 (Nov. 29, 1966), wrote:

"Moreover, we do not think that Alabama affords, after motion for new trial wherein the trial judge's power over judgment is kept alive, any post conviction remedy to assert that a sentence is invalid because of a claim of excessiveness if the second sentence does not go beyond the statutory limit. *Isbell v. State*, 42 Ala. App. 498, 169 So. 2d 27. Our Supreme Court has failed to adopt any general rule that our remedy of *coram nobis* automatically assimilates all rights imposed on state trials by the Fourteenth Amendment. See *Wilson, Federal Habeas Corpus and the State Court Criminal Defendant*, 19 Vand. L. Rev. 741."

And, again, the same Judge, speaking for the same Court, in March 1967 in *Ex Parte Merkes*, reiterated the above-quoted statement from the *Aaron* case and stated further, "We see no reason to go into what should be the rule of credit for prior time until we have to."

The above cases, appearing to represent the law of the State of Alabama upon the question now presented in petitioner's application, make it apparent that Title 28, § 2254

of the United States Code, does not bar the filing of petitioner's application for the writ of habeas corpus as now presented.

Accordingly, it is the Order, Judgment and Decree of the State of Alabama upon the questions now presented to this Court on July 13, 1967, seeking leave to file his application for a writ of habeas corpus in forma pauperis, be and the same is hereby granted. The Clerk of this Court is Ordered and Directed to file without the prepayment of fees and costs the petition for a writ of habeas corpus now presented to this Court by William S. Rice.

It is the further Order, Judgment and Decree of this Court that Curtis M. Simpson, Warden of Kilby Prison, Montgomery, Alabama, and /or any other appropriate official acting for or in behalf of the State of Alabama, on or before August 4, 1967, show cause, if any there be, why this Court should not issue the writ of habeas corpus as herein prayed for by the petitioner, William S. Rice.

It is further Ordered that the Honorable Oakley W. Melton, Jr., of Montgomery, Alabama, be and he is hereby appointed to represent William S. Rice in this action.

It is further Ordered that a copy of this order be served upon the said Curtis M. Simpson as Warden of Kilby Prison and that copies be mailed by certified mail to the Honorable MacDonald Gallion, Attorney General, State of Alabama, Montgomery, Alabama, to the Honorable Oakley W. Melton, Jr., Attorney at Law, Montgomery, Alabama, and to the petitioner, William S. Rice, in care of the Warden of Kilby Prison, Montgomery, Alabama.

Done, this the 17th day of July, 1967.

FRANK M. JOHNSON, JR.,
United States District Judge.

Petition for a Writ of Habeas Corpus

[Received July 13, 1967]

IN THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

(Title Omitted in Printing)

Petitioner Alleges:

1. That he was illegally sentenced by the Circuit Court of Pike County, Alabama, in violation of the Constitution of the United States.

2. That on February 16, 1962, after adjudication of his guilty pleads, the Circuit Court of Pike County, Alabama did impose the following sentences upon the petitioner: four (4) years on Case No. 6427; two (2) years on Case No. 6428; and two (2) years on Case No. 6429; thus resulting in a cumulative term of eight (8) years.

3. That on August 28, 1964, the original conviction, judgment, and sentence on each of the above numbered cases was set aside upon petitioner's application for writ of error coram nobis claiming constitutional violation, i.e., denial of counsel.

4. That on December 3, 1964, after retrial and upon conviction by jury, the Circuit Court of Pike County, Ala-

bama, did impose upon petitioner the following sentences: ten (10) years on Case No. 6427; and ten (10) years on Case No. 6428.

5. That on May 18, 1965, after retrial and conviction by jury, the Circuit Court of Pike County, Alabama, did impose upon petitioner the following sentence: five (5) years on Case No. 6429; and thus resulting in an overall cumulative term of twenty-five (25) years on the above numbered cases.

6. That on December 3, 1964, and on May 18, 1965, after retrial and upon conviction by jury, the Circuit Court of Pike County, Alabama, did impose upon petitioner cumulative sentences in gross excessiveness of the cumulative sentences imposed upon petitioner at the time of his original trial in the above numbered cases, and the said Court did fail to give petitioner credit for prior time served on original cumulative sentences in the above numbered cases; all in violation of the Constitution of the United States.

7. That the State Courts of the State of Alabama does not, by statute or otherwise, afford petitioner an effective and/or corrective remedy to adjudicate his specific claim of constitutional violations; thus denying petitioner an effective and/or corrective post conviction remedy to adjudicate his claim of constitutional violations; all in violation of the Constitution of the United States.

8. That petitioner's instant cause does squarely come within the 'exceptional circumstances' provision of Title 28, Sec. 2254, U.S.C.: and that his petition to obtain federal habeas corpus at this time is not an attempt to

by-pass the exhaustive provision of the aforesaid statute; thus this Honorable Court's jurisdiction to adjudicate his cause is lawfully invoked.

9. That in support of the above stated allegations the petitioner hereto attaches an 'Argument In Support' to his petition and asks that it be made a part thereof.

Wherefore Petitioner Prays:

1. That process issue calling upon the hereinabove named respondent to show cause, if any there be, why the petitioner should not be forthwith discharged from custody and to be granted his liberty.

2. That process issue requiring the hereinabove named respondent, or counsel for him, to bring forth to this Honorable Court the complete State records in the three above numbered cases.

3. That a hearing be held with himself present to develop the issues of fact and law presented herein.

4. That this Honorable Court appoint counsel to assist petitioner in his cause because petitioner is a poor person and unable to employ counsel.

5. That upon final determination the writ of habeas corpus be sustained and petitioner discharged from custody forthwith.

WILLIAM S. RICE

Route 3—Box 115,
Montgomery, Alabama.

[Certification Omitted in Printing]

AFFIDAVIT IN FORMA PAUPERIS

William S. Rice, being sworn on oath as required by law, deposes and says that he is the petitioner in the annexed petition for writ of habeas corpus which he has prepared and now seeks to file in good faith: Because of his poverty he is unable to pay cost of same. He asks therefore, as a citizen of the United States of America that he be allowed to file and prosecute same without payment of cost.

WILLIAM S. RICE,
Affiant.

[Certification Omitted in Printing]

*Argument in Support**Allegations 1 through 5.*

For the sake of brevity petitioner will rely upon the records in his cause to support allegations 1 through 5; other than to direct this Honorable Court's attention to the fact that had he been legally sentenced and given credit for 'prior' time that he has more than served sufficient time to satisfy a cumulative sentence of eight (8) years, and is eligible for forthwith discharge.

Allegation 6.

In the case of Eddie W. Patton, v. State of North Carolina, — F. 2d —, June 1967, the U. S. Court of Appeals for the Fourth Circuit ruled that a prisoner granted a retrial on constitutional grounds cannot be given a sentence in the second trial greater than that imposed in the original proceeding; and not only is the punishment restricted that given at the time of the first conviction but the Court in the second trial must give credit for the time he already served. As Judge Simon E. Sobeloff stated:

"It is impermissible to force upon an accused the risk of more severe punishment as a condition for securing a constitutional right."

and:

"It is grossly unfair for society to take five years of a man's life and then say, 'we now acknowledge that this should not have happened, but we will set everything right by refusing to recognize that it did happen'."

and:

"Time illegally exacted by an unconstitutional sentence is an indisputable fact."

In the case of *Perry Whaley v. State of North Carolina*, — F. 2d —, June 1967, the same Court as in the *Patton* case, *supra*, made substantially the same ruling.

Both the United States Court of Appeals for the First Circuit in *Morano v. United States*, March 1967, — F. 2d —, and the Supreme Court of California in the case of *People v. Narga-Parbet Ali*, March 1967, — P. 2d —, agreed that a criminal defendant cannot be put to a harsher sentence on appeal with the possibility of increasing a sentence at retrial. In the former case, the Court held that the judge should not be permitted to change his mind by deciding that he had been too lenient the first time. In the latter case, the Court stated that a defendant should not be put to the risk of being given a greater punishment on a re-trial for the privilege of exercising his right to appeal.

Petitioner in the case at bar grants that the two cases cited immediately above deal with cases on direct appeal; none the less petitioner submits that the principle of law involved is also applicable in a case where the original conviction and sentence is set aside, by way of post conviction remedy, on grounds of constitutional violation and then re-tried the second time—it follows that a 're-trial' is a 're-trial' regardless as to how it is brought about.

It is, indeed, judicially interesting to note that the Court of Appeals of Alabama in the case of *Aaron v. State of Alabama*, 43 Ala. App. —, 192 So. 2d 456, at 457, did reject this Honorable Court's findings in *Hill v. Holman*, D.C.,

255 F. Supp. 924, primarily, chronologically, because the that case (Hill) was not taken to the Supreme Court of the United States; however, on the other hand and in the same case (Aaron)—the Court of Appeals of Alabama did literally pounce upon and accepted a lesser authority, i.e., the Supreme Court of North Carolina, when the same Patton case, *supra*, was before that Court—and did also accept an equally authoritative Court as this Honorable Court, i.e., a U. S. District Court in North Carolina, in its findings of law in the same Patton case when the case was before that Court, *Patton v. State of North Carolina, D.C.*, 256 F. Supp. 225,—while the whole time being well aware of the obvious fact that the same Patton case had never been taken to the Supreme Court of the United States in either of those instances.

Judicially, in the future, it will be equally as interesting to see whether the appellate Court(s)¹ of Alabama will accept the very latest, by a higher authority, findings in the same Patton case; or will they reject the latest findings primarily because the latest findings in the same Patton case has not been taken to the Supreme Court of the United States; and/or primarily because the latest Patton findings does not serve their purpose—which obviously seems to be a paradoxical reluctance to dispense to prisoners of Alabama even an infinitesimal amount of due process of law—petitioner submits the latter to be more factually than it is intended to be facetious or disrespectful in light to the appellate Courts attitude in respect to

¹ The term "Court(s)" as used throughout petitioner's argument is intended to be applicable in the 'plural tense' only where the findings quoted from the cases of Aaron, *supra*, and Merkes, *supra*, has been before both appellate Courts of the State of Alabama.

'credit for prior time' as exhibited in the case of *Ex parte Merkes*, March 1967, 198 So. 2d 789, at 790, when the Court said:

"We see no reason to go into what should be the rule of credit for prior time UNTIL WE HAVE TO."
(Emphasis added.)

Petitioner submits that this Learned Court's findings in the case of *Hill v. Holman*, D.C., 255 F. Supp. 924, that: "The constitutional requirements of due process will not permit the State of Alabama to require Hill, or any other prisoner for that matter, to be penalized by service in the state penitentiary because of an error made by the state circuit Court." has been held to be judicially sound by at least two federal circuit Courts, involving three instances, in the cases cited in the foregoing outset of this argument.

In light of the foregoing argument it is petitioner's position that he was illegally sentenced by the Circuit Court of Pike County, Alabama, in violation of the Constitution of the United States.

First, to eliminate the circuit Courts of Alabama, whether they would have jurisdiction by trial or venue, from the part they constitute in petitioner's allegation that the State Courts of Alabama does not afford, thus denying, him an effective and/or corrective post conviction remedy to adjudicate his specific claim of constitutional violation, it suffices to say to this Honorable that it is established judicial procedure, and acknowledged, that the several circuit Courts, trial or jurisdictional, within a State, Alabama being no exception, are judicially bound by the rulings articulated by their respective State's appellate Court or Courts; therefore, it is judicially obviously that this petitioner is judicially foreclosed and barred in his trial circuit

Court in any attempt by him to seek redress upon his specific claim of constitutional violation by the post conviction remedy of 'coram nobis' as practiced in Alabama, or by the remedy of 'modification of sentence' as practiced in Alabama by the rulings articulated by the appellate Court(s) of Alabama in the two recent cases of *Aaron v. State of Alabama*, Nov. 1966, 43 Ala. App. —, 192 So. 2d 456; and *Ex parte Merkes*, March 1967, 198 So. 2d 789, cert. den. 198 So. 2d 790. Moreover, the same judicial proposition forecloses and bars any attempt by petitioner to seek redress in his jurisdictional circuit Court by the post conviction remedy of 'habeas corpus' as practiced in Alabama by the rulings articulated by the appellate Court(s) in the immediate above cited cases.

In *Aaron*, supra, a habeas corpus case on appeal, the applicant sought in his jurisdictional circuit Court, and coincidentally his trial circuit Court also, to obtain 'credit for prior time' he had served on his original sentence after original conviction and sentence had been set aside upon claim of constitutional violation and he was re-tried and sentenced the second time, the Court of Appeals of Alabama after citing the provisions of Alabama habeas corpus statutes² made the following findings and judicial conclusions of Alabama procedure and law, at 461:³

"We pretermit "the dead time" question as not being either PROCEDURALLY or evidentially before us."
(Emphasis added.)

² Title 15, Sec. 27 and 28, Code of Alabama 1940.

³ This is the only quotation from the *Aaron*, supra, case, cited by petitioner, that is not reiterated in the *Ex parte Merkes*, supra; the latter having been before both appellate Courts of Alabama.

In the immediate above cited quotation petitioner is only directing this Honorable Court's attention to the procedural aspect of the Aaron case and not to the evidential aspect, as the Aaron case and the instant case are not at all similar evidentially.

And at 460, in Aaron the Court held:

"Moreover, WE DO NOT THINK THAT ALABAMA AFFORDS, after motion for new trial where in the trial judge's power over judgment is kept alive, ANY POST CONVICTION REMEDY TO assert that a sentence is invalid because of a CLAIM OF EXCESSIVENESS if the second sentence does not go beyond the statutory limit. *Isbell v. State*, 42 Ala. App. 498, 169 So. 2d 27. OUR SUPREME COURT HAS FAILED TO ADOPT any general rule that OUR REMEDY OF CORAM NOBIS AUTOMATICALLY ASSIMILATES ALL RIGHTS imposed on state trials by the Fourteenth Amendment." (Emphasis added.)

Petitioner submits that in light of the judicial findings and conclusions of procedure and law, as practiced in Alabama, articulated by the Court in Aaron, supra, it is judicially conclusive that the constitutional claim of 'credit for prior time' and the constitutional claim of 'excessiveness of second sentence' cannot be adjudicated effectively and/or correctively by the post conviction remedies of Habeas Corpus and Coram Nobis in the State Courts of Alabama.

• • •

In the case of *Ex parte Merkes*, 198 So. 2d 789, cert. den. 198 So. 2d 790, a 'modification of second sentence' case on appeal, the applicant sought in his trial circuit Court to obtain 'credit for prior time' served on original sentence

after his original conviction and sentence had been set aside on claim of constitutional violation and he was retried and sentenced the second time, whereupon the appellate Court(s) of Alabama did make the following judicial findings and conclusions of procedure and law, as practiced in Alabama, at 789, 790, the Court held:

“(1, 2) First Merkes did not make this request to the trial Court in time. Since it is a one county circuit, Code 1940, T. 13, Sec. 119, ends its power of the Baldwin County Circuit Court over its judgments thirty days after rendition. This time limit cannot be changed. Boutwell v. State, 278 Ala. 176, 183, So. 2d 774.”

“(3) Second, after the time in which the trial judge can set aside judgment has gone by, **THERE IS NO STATE COURT ACTION** in which to make the claim on which Merkes is trying to have the circuit Court now act. (Emphasis added.)

And at 790:

“Moreover, **WE DO NOT THINK THAT ALABAMA AFFORDS**, after motion for new trial wherein the trial judge's power over judgment is kept alive, **ANY POST CONVICTION REMEDY** to assert that a sentence is invalid because of **A CLAIM OF EXCESSIVENESS** if the second sentence does not go beyond the statutory limit. Isbell v. State, 42 Ala. App. 498, 169 So. 2d 27. Our Supreme Court **HAS FAILED TO ADOPT** any general rule that **OUR REMEDY OF CORAM NOBIS AUTOMATICALLY ASSIMILATES ALL RIGHTS** imposed on state trials by the Fourteenth Amendment.” (Emphasis added.)

With due respect petitioner submits and emphasizes at this point that the latter, immediately above, cited quotation was cited in Aaron, supra, some months prior to the time the same findings were articulated in Merkes, supra, and even farther back in Isbell v. State, cited in the above quotation; therefore, it is very strange but unfortunately true that the appellate Courts of Alabama have for some period of time readily admitted that 'Alabama has no post conviction remedy or other State Court action to assert that a sentence is invalid because of a claim of excessiveness and that coram nobis does not automatically assimilates all rights, nor is there any State Court action in which to assert the claim of 'prior time' served on original sentence, but yet has made no effort and has not shown any inclination to rectify the existing situation—notwithstanding the fact that the appellate Courts are duty bound to uphold the, among other things, Constitution of the United States. Petitioner further submits that the appellate Courts of Alabama when they exhibited the attitude they did in respect to prior time, as quoted from Merkes, supra, and cited on page iii of this argument, that the presumption is great enough, uniformly correlated with other appellate conclusions, that the same attitude is also applicable to petitioner's position that the appellate Courts of Alabama does not intend to assure its prisoners of their constitutional rights until they have to—the findings and conclusions articulated by the said appellate Courts of Alabama shown hereinabove and hereinafter does, indeed, for all judicial purposes suggest exactly that.

The findings and conclusions of Alabama procedure and law articulated by the appellate Courts of Alabama in Merkes, supra, a case where the remedy of 'modification of sentence' is conclusively eliminated by Alabama statute,

the allegation that 'Coram Nobis' is not applicable and available to petitioner is further supported by ruling the Court articulated in Merkes, at 790:

"Even were we to take Merkes's petition as one for a writ of error coram nobis, under Ex parte Jenkins, 38 Ala. App. 117, 76 So. 2d 858, we do not consider it to make out any "error of law apparent on the transcript" as Code 1940, T. 15, Sec. 383, puts the limit on that writ.

In further support, insofar as 'coram nobis' is eliminated as a post conviction remedy to adjudicate petitioner's specific claim of constitutional violation, petitioner submits that since Alabama Courts first adopted 'coram nobis' as a post conviction remedy there has been, by Alabama state Courts, rulings too numerous to cite that holds 'coram nobis, is only available when there is an error of law apparent on the transcript that would render the conviction void; in the case at bar the petitioner does not, and rightly so, allege that his specific claim of constitutional violation renders his conviction void—which in itself would eliminate the applicability and availability, under Alabama law, of 'coram nobis' in his trial circuit Court to adjudicate petitioner's specific claim of constitutional violation.

Petitioner further submits that in light of the foregoing judicial findings and conclusions, uniformly correlated, articulated by the appellate Courts of Alabama that this Learned Court can without any hesitancy agree with the above mentioned Court(s) when they said: " we do not think that Alabama affords. . . . any post conviction remedy to assert that a sentence is invalid because of excessiveness. . . . ". It is also petitioner's position that this Learned Court can agree with the petitioner in the instant

case that he cannot, in the State Courts of Alabama, possibly adjudicate his specific claim of constitutional violation neither the remedy of (a) habeas corpus, (b) modification of sentence, or (c) coram nobis; thus the State Courts of Alabama deny him an effective and/or corrective post conviction to adjudicate his specific claim of constitutional violation in violation of the Constitution of the United States.

It is petitioner's position that in light of the overall, correlated and foregoing argument brings forth, with much significance, the following question: How much longer are the State Courts of Alabama going to be permitted to proceed with their continuity of non-compliance with the principle of law articulated as far back as 1935 by the highest Court of the land in the case of *Mooney v. Holohan*, 294 U.S. 1031; there the Supreme Court of the United States held that the several States must provide its prisoners with an effective and/or corrective post conviction remedy to adjudicate their claims of constitutional violation. Again in 1949 in the case of *Young v. Ragen*, 337 U.S. 235, 69 S.Ct. 1073, 93 L. Ed. 1333, reiterated the same principle of law presented in the *Mooney* case; and once again in 1965 in the case of *Case v. Nebraska*, 381 U.S. 336, 85 S.Ct. 1486, the Supreme Court of the United States reiterated the same principle of law as presented in *Mooney*, and *Young*, and did elaborate by holding that when a State does afford a post conviction remedy that the Court presupposes that the remedy be an effective remedy to adjudicate its prisoner's claims of constitutional violation.

Allegation No. 8.

In order not to burden this Honorable Court with any lengthy argument in support of this (No. 8) allegations petitioner incorporates, by reference, the foregoing overall

argument heretofore presented and submits that he has shown unto this Honorable Court that he is factually and judicially denied of an effective and/or corrective post conviction remedy to adjudicate his specific claim of constitutional violation in the State Courts of Alabama; hence, his cause in the case at bar comes squarely within the 'exceptional circumstances' provision of Title 28, Sec. 2254, United States Code; that his petition for federal habeas corpus at this time is not an attempt to bypass the exhaustive principle pursuant to the same above cited federal statute; thus this Honorable Court's jurisdiction to adjudicate petitioner's instant cause is lawfully invoked.

In further support the petitioner submits that his position is that his predicament is analogous with the applicant in the case of *Bell v. Alabama*, — F. 2d —, Sept. 1966, an 'exceptional circumstances' case, insofar as the applicant there had no Court to resort to except to his federal district Court of jurisdiction; likewise, this petitioner has no Court to resort to except to this Honorable Court to seek redress upon his specific claim of constitutional violation. Also see *Frishi v. Collins*, Mich. 1952, 72 S.Ct. 509, 342 U.S. 519, 96 L. Ed. 541, rehearing denied 72 S.Ct. 728, 343 U.S. 937, 96 L. Ed. 1344; and *Bacom v. Sullivan*, C.A., Fla. 1952, 194 F. 2d 166. Moreover, should petitioner in the case at bar be forced to pursue a non-existing post conviction remedy through the State Courts of Alabama he only be caused frustration, despair and further deprivation of his liberty.

It is petitioner's concluding position that, by his foregoing argument in its entirety, he has conclusively shown this Honorable Court sufficient cause for this Court to lawfully invoke its jurisdiction and to adjudicate the instant

case at this time, to sustain the writ of habeas corpus, and to order petitioner's forthwith discharge.

Respectfully submitted;

WILLIAM S. RICE,

Route 3—Box 115,
Montgomery, Alabama.

[Certification Omitted in Printing]

**Return and Answer and, in the Alternative, Motion
to Dismiss of Respondent**

[Filed August 3, 1967]

**IN THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION**

(Title Omitted in Printing)

Comes now your Respondent, Curtis M. Simpson, Warden, Kilby Prison, Montgomery, Alabama, by and through the Attorney General of Alabama, MacDonald Gallion, and Assistant Attorney General, Paul T. Gish, Jr., and, in answer to the order to show cause heretofore issued by this Honorable Court, on July 17, 1967, does herewith submit the following:

1. Petitioner is lawfully confined in Kilby Prison, Montgomery, Alabama, by virtue of the judgment of the Circuit Court of Pike County, Alabama, rendered on May 19, 1965, and the sentence imposed by said Circuit Court on said date in Case No. 6430.

2. On February 16, 1962, petitioner entered pleas of guilty in the Circuit Court of Pike County, Alabama, in Cases Numbered 6427, 6428, 6429 and 6430, and he was adjudged guilty by said Circuit Court in each of said cases. In Case No. 6427 said Circuit Court sentenced the petitioner to serve a term of four years in the State penitentiary. In each of the other cases, petitioner was sentenced to serve a term of two years in the penitentiary.

3. On August 28, 1964, the Circuit Court of Pike County, Alabama, granted an application for writ of error coram nobis filed by the petitioner in said Court and set aside the judgments and sentencees in each of the cases mentioned in the preceding paragraph. (See Exhibit "A", attached hereto and made a part hereof.)

4. On December 3, 1964, petitioner was tried by a jury in Cases Numbered 6427 and 6428, and upon a verdict of guilt the Court sentenced the petitioner to serve a prison term of ten years in each of these cases. (See Exhibits "B" and "C", attached hereto and made a part hereof.)

5. An appeal was taken by the petitioner to the Court of Appeals of Alabama from the judgments of conviction in each of the cases mentioned in the preceding paragraph, and these cases were affirmed by said Court on December 5, 1965.

6. On May 19, 1965, the Circuit Court of Pike County, Alabama, entered a judgment of nolle prosequi, in Case Number 6429 wherein the petitioner was accused of the crime of burglary in the second degree. (See Exhibit "D", attached hereto and made a part hereof.)

7. On May 19, 1965, petitioner was convicted upon his plea of not guilty by a jury in Case Number 6430, and sentenced by the Circuit Court of Pike County, Alabama, to a prison term of five years in said case. (See Exhibit "E", attached hereto and made a part hereof.)

8. No appeal was taken by the petitioner from his conviction in Case Number 6430, and he immediately began serving his sentence in said case.

9. One of the reasons that a judgment of nolle prosequi was entered in Case Number 6429 by the Circuit Court of Pike County, Alabama, on May 19, 1965; was the fact that petitioner had already served a part of his sentences imposed upon him on February 16, 1962, prior to his discharge from prison upon the granting of his petition for writ of error coram nobis. (See Exhibit "F", attached hereto and made a part hereof.)

10. At the time petitioner's application for writ of error coram nobis was granted in all cases in which he had been convicted no judgment existed upon which the prison authorities could give the petitioner credit for the time which had been served in prison.

11. Petitioner has not exhausted all remedies available to him in the Courts of the State of Alabama.

12. Respondent denies each and every allegation set forth in the petition heretofore filed in this cause.

Wherefore, The Premies Considered, the Respondent, by and through the Attorney General of Alabama, respectfully requests this Honorable Court to grant this, its motion to dismiss, and to determine that the Respondent has shown good cause why the petition should be denied.

Respectfully submitted,

MACDONALD GALLION,
Attorney General,

PAUL T. GISH, JR.,
Assistant Attorney General,
Attorneys for Respondent.

EXHIBIT "A"

State of Alabama
Board of Corrections

July 24, 1967

To Whom it May Concern:

Re: Rice, William Stewart, Ala: #82899.

This Is To Certify That The Above Named Subject Was Sentenced From Pike County on 2-16-62, Cases #6427, 8, 9, 30 for 4 cases of burglary, terms, 4 years in first case and 2 years on each 2nd, 3rd, and fourth. Subject was discharged by Court Order on 8-28-64.

Subject was re-sentenced from Pike County Circuit Court, Cases #6427, 8, on 12-3-64 for burglary, term 10 years each case. (2 cases.)

Appealed, 12-3-64 and affirmed 12-5-65 by Alabama Court of Appeals.

Re-sentenced on Case #6430, Pike County Circuit Court, burglary, term, 5 years on 5-18-65.

Subject serving on Case #6430 with Cases #6427 to be served at expiration, and Case #6428 at expiration of Case #6427.

Done this 24th day of July, 1967.

MILFORD S. DEAN,
(Milford S. Dean),
Record & Ident. Officer.


(Seal)

Sworn to and subscribed before me this the 26th day of July 1967.

W. L. BATTLE,
Notary Public.

My Commission Expires 13 Dec. 1970.

EXHIBIT "B"

(See opposite) 

INDICTMENT

The State of Alabama, PIKE CountyCircuit Court SPRING - Term, 1962The Grand Jury of said County charge that before the finding of this indictment: William Stewart Rice

Whose name is to the Grand Jury otherwise unknown. did, with the intent to steal, break into and enter a shop, store or warehouse, the property of Gamaliel P. Green in which goods, wares or merchandise, things of value, were kept for use, sale or deposit,

The State of Alabama,

PIKE County

Circuit Court

SPRING

Term, 1962

The Grand Jury of said County charge that before the finding of this indictment:

William Stewart Rice

Whose name is to the Grand Jury otherwise unknown.

did, with the intent to steal,

break into and enter a shop, store or warehouse, the property of

Gamaliel P. Green

in which goods, wares or merchandise, things of value, were kept
for use, sale or deposit,

Exh. - "B" - Page 1

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against the peace and dignity of the State of Alabama.

Samuel F. Fulle

Solicitor of the Twelfth Judicial Circuit

No. _____

The State of Alabama
PIKE COUNTY

CIRCUIT COURT

Spring Term, 1962

THE STATE
vs.

William Stewart Rice

OFFENSE:

Burglary

INDICTMENT

Witnesses:

Grand Jury No. 43

A TRUE BILL:

William H. Hester
Foreman Grand Jury.

Filed in open Court on the 13 day of
Feb., 1962
in the presence of the Grand Jury.

Robert Newman Jr.
Clerk.

Presented to the presiding Judge in open Court
by the Foreman of the Grand Jury, in the pres-

ence of 17 other Grand Jurors, and filed

by order of Court this 13 day of

Feb., 1962
Robert Newman Jr.
Clerk.

It is ordered that the Clerk issue Capias for
this named defendant and that the sheriff ar-
rest the defendant and commit the defendant to
Jail unless the defendant give bail in the sum

of: 500.00

Earl J. Hall
Judge

Service of Copy of Indictment and List of
Jurors on Defendant in Capital Case. 7840 Code.

The State of Alabama,
PIKE COUNTY

Circuit Court, _____ Term, 19____

I, _____
Clerk of the Circuit Court in and for Pike Coun-
ty, Alabama, do hereby certify that the within
and foregoing is a true, correct and exact copy
of the Indictment returned by the Grand Jury
of said County, against the within named De-
fendant.

Witness my hand and seal of office, this the

_____ day of _____

19____

Clerk

I, Robert Newman, Jr. Clerk & Register of the Circuit Court for
Pike County, Alabama, do hereby certify that the foregoing is
a true and correct copy of the original document in the above
stated cause, which is on file and enrolled in my office
this 13 day of Feb., 1962.
Witness my hand and seal this the 13 day of Feb., 1962.

Robert Newman Jr.
Clerk & Register

The State of Alabama,

PIKE COUNTY

Before me Hugh Starling

Justice of the Peace

for said County, personally appeared W.S. Furlow, As Sheriff Pike County, Alabama

who being duly sworn says on oath that he has probable cause for believing and does believe, that in Pike County,

within twelve months before making this affidavit, William Stewart Rice, Alias

did with intent to steal break into and entered
Gruen's Drug Store (house) in which goods stolen
therein and to other valuable things with Rape for
same sake of perpetration.

against the peace and dignity of the State of Alabama.

Sworn to and subscribed before me, this 5thday of February19 62at High Starling

J.P.

The State of Alabama }

PIKE COUNTY

To Any Lawful Officer of the State of Alabama, Greeting:

You are hereby commanded to arrest William Stewart Rice, Aliasand bring before me Hugh Starling J.P.

to answer the State of Alabama of a charge of

BurglaryPreferred by W.S. Furlow, As Sheriff Pike County, AlabamaWitness my hand this 5th day of February 19 62High Starling

Justice of the Peace

I Robert Newman, Jr. Clerk & Register of the Circuit Court say
 this Complaint, Alabama, is a true and correct copy of the original document in the above
 stated case, which is on file and enrolled in my office.
 Witness my hand and seal this 25th day of July, 1962.

Eff. '6" Page 2. Acting Register

361

24

362

RECEIVED IN OFFICE

February 5th 1962

H. A. Lunsford Sheriff

I have executed this warrant this 5th

February 1962

by arresting the within named defendant and

Bringing him
before Hugh Starling
J. P. and committing
him to jail in
without Bail

H. A. Lunsford

Sheriff

Deputy Sheriff

No. 43 Page

The State of Alabama,
PIKE COUNTY

JUSTICE COURT OF

Hugh Starling

THE STATE OF ALABAMA

William Stewart Rice, Alias

COMPLAINT AND WARRANT
OF ARREST

The Officer Arresting may admit the Defendant to Bail in the sum of

\$750.00 DOLLARS

Hugh Starling J. P.

STATE WITNESSES

Gamaliel P Green

Det. Jack Shows

Det. D. D. Collins

Ident. John Williams

J. Q. Parker

Curtis Bull

State Tax-collector Finley

Jeff Richmond

H. A. Lunsford

The State of Alabama, } IN THE COURT OF
PIKE COUNTY, ALABAMA

NO. THE STATE OF ALABAMA,
vs.

Before me

Pike County, Alabama, personally appeared

who being duly sworn deposes and says:

I am the

In the

I or one of my

I am entitled to mileage at ten cents per mile to and from the Court in this case.

Subscribed and sworn to before me, this 19 day of 19

Disposition of Case

After considering the above affidavit made by the Sheriff of Pike County, Alabama, I, as the trial Judge of said Court, hereby approve the claim for mileage in the sum of \$ incurred in the making of the arrest or executing the Warrant of Arrest in the above styled case and I hereby order the Clerk of the Court to pay the said sum as part of costs in the case.

This the 19 day of 19

Judge of the above named Court.

STATE TRIAL DOCKET

CASE NO.

FEE BOOK.....P

CIRCUIT COURT OF PIKE COUNTY

Fig. Co., Mobile.

ATTORNEYS

PARTIES

CHARGE

SHERIFF

enneth T. Fuller

THE STATE

Burglary

2-13-6

vs.

William Stewart Rice

Date of Orders
Mo. Day Year

ORDERS OF COURT

2/16/62

*Def't Arr. Arrangement in open
Court Pleads Guilty as charged
in indictment. Formally indicted
guilty. And is sentenced to State
of Alabama for 14 years.*

Defendant before being arraigned was asked the following questions,
Have you employed Counsel or have you made arrangements to be
represented, assisted, and defended by Counsel in this case?

Answer. no

Are you financially able to employ an Attorney to represent, assist
and defend you in this case? Answer. no

Do you desire the Court to appoint an Attorney to represent, assist
and defend you in this case? Answer. yes

It appearing to the satisfaction of the Court that Defendant in this case
is indigent and desires legal Counsel, it is ordered and adjudged
by the Court that Jackson W. Stebbins, a practicing Attorney in
this Court, be and he is hereby appointed as Counsel to represent,
assist and defend Defendant in this case.

Judge

I, Robert Newman, Jr., Clerk & Register of the Circuit Court for
Pike County, Alabama, do hereby certify that the foregoing is
a true and correct copy of the original document in the above
stated case, which is on file and enrolled in my office.
Witness my hand and seal this the 25 day of July, 1962.

Robert Newman
Clerk & Register

Exh- "B" Page 3.

6427

State VS. William Stewart Rice

PAGE NO.

Date of Orders
Mo. Day Year

ORDERS OF COURT

Minute Book
Volume Page

11 5 64

Defendant being present in open Court with counsel, on arraignment pleads not guilty to the charge and each charge embraced in the

Indictment. His case is set for trial Dec 2

19 64

This the 5 day of Nov. 1964

[Signature] Judge

12 3 64

Jury and Verdict finding defendant guilty as charged in the indictment. Verdict arrived in presence of Dft and Court read the Verdict to Dft and delayed sentencing until a later time on this day (12/3/64)

12 3 64

On jury Verdict, Dft. is formally sentenced to imprisonment in the Penitentiary of Alabama for 10 years. Dft. gave notice of appeal. Execution of sentence suspended pending appeal. Bond fixed at \$5000. Jackson W. Stokes is appointed to represent Dft. on appeal.

3 496

INDICTMENT

The State of Alabama, _____ PIKE County

Circuit Court _____ SPRING Term, 1962

The Grand Jury of said County charge that before the finding of this indictment: _____
William Stewart Rice

Whose name is to the Grand Jury otherwise unknown. did with the intent to steal, break into and enter a shop, store or warehouse, the property of The Central of Georgia Railway Co., a corporation, in which goods, wares, or merchandise, things of value, were kept for use, sale or deposit,

EXHIBIT "C"

193

against the peace and dignity of the State of Alabama.

Exh- "C" Page 1

Ernest H. Fullen
Solicitor of the Twelfth Judicial Circuit

No. _____

The State of Alabama
PIKE COUNTY

CIRCUIT COURT

Spring Term, 19 62

THE STATE

VS.

William Stewart Rice

OFFENSE:

Burglary

INDICTMENT

Witnesses:

Grand Jury No. 44

A TRUE BILL:

Foreman Grand Jury.

Filed in open Court on the 13 day of Feb, 1962
in the presence of the Grand Jury.

Robert Newman
Clerk

Presented to the presiding Judge in open Court
by the Foreman of the Grand Jury, in the pres-

ence of 17 other Grand Jurors, and filed

by order of Court this 13 day of

Sub. 1, 1962
Robert Newman
Clerk.

It is ordered that the Clerk issue Capias for this named defendant and that the sheriff arrest the defendant and commit the defendant to Jail unless the defendant give bail in the sum

of 2,500

Erin L. Hunt Judge

Service of Copy of Indictment and List of Jurors on Defendant in Capital Case. 7840 Code

The State of Alabama,
PIKE COUNTY

Circuit Court, _____ Term, 19__

1. Clerk of the Circuit Court in and for Pike County, Alabama, do hereby certify that the within and foregoing is a true, correct and exact copy of the Indictment returned by the Grand Jury of said County, against the within named Defendant.

Witness my hand and seal of office, this the

day of _____

19_____

_____, Clerk.

I Robert Newman, Jr., Clerk & Register of the Circuit Court for
Fiske County, Alabama, do hereby certify that the foregoing is
a true and correct copy of the original document in my office
dated this the 25 day of July 1887
Witness my hand and seal this the 25 day of July 1887
Robert Newman Jr.
Clerk & Register

The State of Alabama, Pike County

CIRCUIT COURT

TO ANY SHERIFF OF THE STATE OF ALABAMA---GREETING:

An indictment having been found against Wm. Stewart Riceat the Spring Term, 19 62, of the Circuit Court of PikeCounty, for the offense of Burg.you are therefore commanded forthwith to arrest Wm. Stewart Riceand commit him to jail, unlesshe give bail to answer such indictment at the next term of our Circuit Court, to be holden for said County, on theMonday in next, and make return of this writ, according to law.Witness this 13th day of Febry., 19 62Robert Newman, Clerk

I, Robert Newman, Jr., Clerk & Register of the Circuit Court for Pike County, Alabama, do hereby certify that the foregoing is a true and correct copy of the original document in the above stated cause, which is on file and accessible in my office.

Witness my hand and seal this the 15 day of Febry 1962.

Robert Newman Jr.
Clerk & Register

No. 44

The State of Alabama
PIKE COUNTY
CIRCUIT COURT

THE STATE

vs.

Wm. Stewart Rice

WRIT OF ARREST

Issued this 13th day

of Feby., 19 62

Bail \$500.00

Received in Office

2/13

62

W. H. Lamm, Sheriff

Executed by arresting the within named Defendant, and

W. H. Lamm

Feb 13th

62

W. H. Lamm, Sheriff

36

We the Jury find the defendant guilty as charged

W. H. Lamm

COMPLAINT AND WARRANT OF ARREST

Troy Printing Co., Troy

The State of Alabama, }

PIKE COUNTY

Before me Hugh Starling

Justice of the Peace

for said County, personally appeared W.S. Furlow, As Sheriff Pike County, Alabama

who being duly sworn says on oath that he has probable cause for believing and does believe, that in Pike County, within twelve months before making this affidavit William Stewart Rice, Alias

did with intent to steal broke into and entered the
Central of Georgia Railway Co. Freight Station
in which goods were stored or other valuable thing
was kept for use, sale or deposit.

against the peace and dignity of the State of Alabama.

Sworn to and subscribed before me, this 5th
day of February 19 62

Hugh Starling J. P.

The State of Alabama }
PIKE COUNTY

To Any Lawful Officer of the State of Alabama, Greeting:

You are hereby commanded to arrest William Stewart Rice, Alias

and bring before me Hugh Starling, J.P.

to answer the State of Alabama of a charge of

Burglary

Preferred by W.S. Furlow, As Sheriff Pike County, Ala

Witness my hand this 5th day of February 19 62

Hugh Starling
Justice of the Peace

RECEIVED IN OFFICE

February 2th 1962
 H. A. Linn
 Sheriff

I have executed this warrant this

5th

February 62
 19

by arresting the within named defendant and

Bringing him
 before Hugh Starling
 J. P. committing
 him to jail in
 default of bail

H. A. Linn
 Sheriff

Deputy Sheriff

No.

Page

(44)
 The State of Alabama,
 PIKE COUNTY

JUSTICE COURT OF

Hugh Starling

THE STATE OF ALABAMA

William Stewart Rame, Alias

COMPLAINT AND WARRANT
 OF ARREST

The Officer Arresting may admit the Defendant to Bail in the sum of

\$750.00

DOLLARS

Hugh Starling

J. P.

STATE WITNESSES

Walter M Duke

Det. Jack Shows

Det. D. D. Collins

Lieut. John Williams

J. Q. Parker

Curtis Bull

State Toxicologist Finley

Jeff Redmond

H. A. Linn

COURT OF

IN THE

The State of Alabama,
 PIKE COUNTY

NO

THE STATE OF ALABAMA,
 vs.

PIKE COUNTY, ALABAMA, do hereby certify that the foregoing is a true and correct copy of the original document is the above stated cause, which is on file and enrolled in my office. Witness my hand and seal this the 23rd day of February, 1962.

Robert Newman
 Clerk & Register

Before me

Pike County, Alabama, personally appeared

who being duly sworn deposes and says:

I am the Sheriff of Pike County, Alabama.

In the case of the State of Alabama vs.

in the above mentioned Court, in executing the Warrant of Arrest or in arresting the said Defendant, I or one of my duly authorized Deputies traveled _____ miles by the most direct route to the point of arrest and return, and

I am entitled to mileage at ten cents per mile to be taxed as costs in the case.

Subscribed and sworn to before me, this _____ day of _____, 19____

Disposition of Case

After considering the above affidavit made by the Sheriff of Pike County, Alabama, I, as the trial Judge of said Court, hereby approve the claim for mileage in the sum of \$_____ incurred in the making of the arrest or executing the Warrant of Arrest in the above styled cause and I hereby order the Clerk of the Court to tax the said sum as part of costs in the case.

This the _____ day of _____, 19____

Judge of the above named Court.

STATE TRIAL DOCKET

6430
CASE NO. 642

FEE BOOK

CIRCUIT COURT OF PIKE COUNTY

PAGE

ATTORNEYS	PARTIES	CHARGE	SHERIFF'S RETURN
nneth T. Fuller	THE STATE vs. William Stewart Rice	Burglary	2-13-62

of Orders	Day	Year	ORDERS OF COURT	Minute B.	Volume
-----------	-----	------	-----------------	-----------	--------

16 62 Deft. on arraignment in open court pleads guilty as charged in indictment. Formally adjudged guilty and is sentenced to penitentiary of Alabama for 2 years.

Leo H. H. H.
Circuit Judge.

Defendant before being arraigned was asked the following questions.
Have you employed Counsel or have you made arrangements to be represented, assisted, and defended by Counsel in this case?
Answer. No.
Are you financially able to employ an Attorney to represent, assist and defend you in this case? Answer. No.
Do you desire the Court to appoint an Attorney to represent, assist and defend you in this case? Answer. Yes.
It appearing to the satisfaction of the Court that Defendant in this case is indigent and desires legal Counsel, it is ordered and adjudged by the Court that Jackson W. Stiles, a practicing Attorney in this Court, be and he is hereby appointed as Counsel to represent, assist and defend Defendant in this case.

J. H. H. Judge

I Robert Newman, Jr. Clerk & Register of the Circuit Court for Pike County, Alabama, do hereby certify that the foregoing is a true and correct copy of the original document in the above stated cause, which is on file and enrolled in my office.

Robert Newman Jr.
Clerk & Register

EXH "C" Page 4.

PAGE NO.

6428

Date of Orders
Mo. Day Year

ORDERS OF COURT

Minute Book
Volume Page

11 5 64

Defendant being present in open Court with counsel, on arraignment
pleads not guilty to the charge and each charge embraced in the
indictment. His case is set for trial Dec. 2

1964This the 5 day of Nov. 1964W. H. T. T. T. Judge

12 3 64

Jury and Verdict finding defendant
guilty as charged.

As Jury Verdict, Defendant is formally
sentenced to the Penitentiary of Alabama
for 10 years.

428-493

INDICTMENT

Form 177a, Oct. 1967, Ala.

The State of Alabama, PIKE County

Circuit Court SPRING Term, 1962

The Grand Jury of said County charge that before the finding of this indictment:

William Stewart Rice

Whose name is to the Grand Jury otherwise unknown. did, with the intent to steal, break into and enter a shop, store or warehouse, the property of N. Randall Phillips, in which goods, wares or merchandise, things of value were kept for use, sale or deposit,

"Sch- "D" Page 1

125

against the peace and dignity of the State of Alabama.

Ernest H. Hall
Solicitor of the Twelfth Judicial Circuit

No. _____

The State of Alabama
PIKE COUNTY

CIRCUIT COURT

Spring Term, 1962

THE STATE
vs.

William Stewart Rice

OFFENSE:

Burglary

INDICTMENT

Witnesses:

Grand Jury No. 45

A TRUE BILL

William Stewart Rice
Foreman Grand Jury.

Filed in open Court on the 13 day of
Feb, 1962
in the presence of the Grand Jury.

Robert Newman Jr.
Clerk.

Presented to the presiding Judge in open Court
by the Foreman of the Grand Jury, in the pres-

ence of 17 other Grand Jurors, and filed

by order of Court this 13 day of

Feb, 1962

Robert Newman Jr.
Clerk.

It is ordered that the Clerk issue Capias for
this named defendant and that the sheriff ar-
rest the defendant and commit the defendant to
jail unless the defendant give bail in the sum

of \$ 1000

William Stewart Rice
Judge.

I Robert Newman, Jr. Clerk & Register of the Circuit Court for
Pike County, Alabama, do hereby certify that the foregoing is
a true and correct copy of the original document in the above
stated cause, which is on file and recorded in my office.
Witness my hand and seal this the 23 day of Feb, 1962

Robert Newman Jr.
Clerk & Register

TRCV PTO. 40, TRCV, ALA.

Service of Copy of Indictment and
Jurors on Defendant in Capital Case.

ist of
10 Code.

The State of Ala
PIKE COUNTY

Circuit Court, _____

I, _____
Clerk of the Circuit Court in
ty, Alabama, do hereby certi-
and foregoing is a true, cor-
of the Indictment returned
of said County, against th
defendant.

Witness my hand and

day of _____

19 _____

this the

Clerk.

Writ of Arrest

TEBY PTO. 62., TEBY, ALA.

The State of Alabama, Pike County

CIRCUIT COURT

TO ANY SHERIFF OF THE STATE OF ALABAMA: GREETING:

An indictment having been found against Wm. Stewart Rice

at the Spring Term, 19 62, of the Circuit Court of Pike
County, for the offense of Burg.

you are therefore commanded forthwith to arrest Wm. Stewart Rice

and commit him to jail, unless

he give bail to answer such indictment at the next term of our Circuit Court, to be holden for said County, on the

Monday in Feb., 19 62, next, and make return of this writ, according to law.

Witness, this 13th day of Feb.

Robert Newman, Clerk

I Robert Newman, Jr. Clerk & Register of the Circuit Court for Pike County, Alabama, do hereby certify that the foregoing is a true and correct copy of the original document in my office, stated cause, which is on file and subscribed in my office, dated this the 25 day of Feb. 1962.

Robert Newman
Clerk & Register

No. 45

The State of Alabama

PIKE COUNTY

CIRCUIT COURT

THE STATE

vs.



Wm. Stewart Rice

WRIT OF ARREST

Issued this 13th day

of Feby. 19 63

Robert Newman
Clerk

Bail \$500.00

TROY PTO. CO., TROY, ALA.

Received in Office

H. J. 62

19

W. A. Lencer, Sheriff

Executed by arresting the within named De-

fendant..... and

Already in Jail

Feb 13th 62

19

W. A. Lencer, Sheriff

7.11.7
310

COMPLAINT AND WARRANT OF ARREST

Troy Printing Co., Troy

The State of Alabama, }

PIKE COUNTY

Before me Hugh Starling

Justice of the Peace

for said County, personally appeared W.S. Furlow, As Sheriff Pike County, Alabama

who being duly sworn says on oath that he has probable cause for believing and does believe, that in Pike County, within twelve months before making this affidavit William Stewart Rice, Alias

did with intent to steal horse with and entered
the N. Randall Phillips & Son's American
Rip Company office and warehouse in which
goods were stored and was taken away by
James Hale on 10th day of

against the peace and dignity of the State of Alabama.

Sworn to and subscribed before me, this 5th

day of February

19 62

Hugh Starling J.P.

The State of Alabama }

PIKE COUNTY

To Any Lawful Officer of the State of Alabama, Greeting:

You are hereby commanded to arrest William Stewart Rice, Alias

and bring before me Hugh Starling, J.P.

to answer the State of Alabama of a charge of

Burglary

Preferred by W.S. Furlow, As Sheriff Pike County, Alabama

Witness my hand this 5th day of February 19 62

Hugh Starling Justice of the Peace

350
RECEIVED IN OFFICE
February 5th 1962
H. L. Lumsden Sheriff

I have executed this warrant this *5th*
February 1962
by arresting the within named defendant and
Bringing him
before Hugh Starling
J. P. and committing
him to jail in
proper bail

H. L. Lumsden Sheriff
Deputy Sheriff

No. *(45)* Page

The State of Alabama,
PIKE COUNTY
JUSTICE COURT OF

Hugh Starling
THE STATE OF ALABAMA
vs.

William Stewart Rice, Alias

COMPLAINT AND WARRANT
OF ARREST

The Officer Arresting may admit the Defendant to Bail in the sum of
\$750.00 DOLLARS
Hugh Starling J. P.

STATE WITNESSES
N Randall Phillips
Det. Jack Shows
Det. D.D. Collins
Lieut. John Williams
J. O. Parker
Curtis Bull
State Tax-collector Finley
Jeff McDonald
H. L. Lumsden

The State of Alabama, } IN THE COURT OF
PIKE COUNTY, ALABAMA

NO. _____
THE STATE OF ALABAMA
vs.
Witness my hand and seal this the *25th* day of *July* 19*62*

Robert Newman
Clerk & Register

Before me _____, who being duly sworn deposes and says:
Pike County, Alabama, personally appeared _____
I am the Sheriff of Pike County, Alabama.
In the case of the State of Alabama vs. _____
in the above mentioned Court, in executing the Warrant of Arrest or in arresting the said Defendant, I or one of my
duly authorized Deputies traveled _____ miles by the most direct route to the point of arrest and return, and
I am entitled to mileage at ten cents per mile to be taxed as costs in the case.

Subscribed and sworn to before me, this _____ day of _____ 19____

Disposition of Case
After considering the above affidavit made by the Sheriff of Pike County, Alabama, I, as the trial Judge of said Court,
hereby approve the claim for mileage in the sum of \$ _____ incurred in the making of the arrest or executing
the Warrant of Arrest in the above styled cause and I hereby order the Clerk of the Court to tax the said sum as part
of costs in the case.

This the _____ day of _____ 19____
Judge of the above named Court

STATE TRIAL DOCKET

6429
CASE NC

CIRCUIT COURT OF PIKE COUNTY

FEE BOOK.....P/

ATTORNEYS	PARTIES	CHARGE	SHERIFF'S
Kenneth T. Fuller	THE STATE William Stewart Rice vs.	Burglary	2-13-62

Date of Orders Mo. Day Year		ORDERS OF COURT
2	16 62	Deft. on arraignment in open court pleads guilty as charged in indictment. Formally adjudged guilty and is sentenced to penitentiary of Alabama for 2 years.
11	5-64	<p>Defendant before being arraigned was asked the following questions. Have you employed Counsel or have you made arrangements to be represented, assisted and defended by Counsel in this case? Answer: <u>No.</u></p> <p>Are you financially able to employ an Attorney to represent, assist and defend you in this case? Answer: <u>No.</u></p> <p>Do you desire the Court to appoint an Attorney to represent, assist and defend you in this case? Answer: <u>yes.</u></p> <p>It appearing to the satisfaction of the Court that Defendant in this case is indigent and desires legal Counsel, it is ordered and adjudged by the Court that <u>Robert L. Newman, Jr.</u>, a practicing Attorney in this Court, be and he is hereby appointed as Counsel to represent, assist and defend Defendant in this case.</p> <p><u>Robert L. Newman, Jr.</u> Judge</p>

I, Robert L. Newman, Jr., Clerk & Register of the Circuit Court for Pike County, Alabama, do hereby certify that the foregoing is a true and correct copy of the original document in the above stated cause, which is on file and untolled in my office.
Witness my hand and seal this the 11 day of July 1964

Robert L. Newman, Jr.
Clerk & Register

"58h" "D" Page 4

CASE NO. 6129

State

VS.

William Stewart Rice

PAGE NO.

Date of Orders		
Mo.	Day	Year
11	5	64
12	3	64
5	14	65

ORDERS OF COURT

Defendant being present in open Court with counsel, on arraignment pleads not guilty to the charge and each charge embraced in the

Indictment. His case is set for trial Dec. 2

19 64

This the 5 day of Nov. 1964

T. J. Turner Judge

^{cause}
This is continued on Motion of Dept Made
in open Court together with let issued

In Court of the State of Ark.
Ed. Hall Clerk. E. J. Ford

Minute Book
Volume Page

197

INDICTMENT

1907 P.S. CO., TROY, ALA.

The State of Alabama, _____ PIKE _____ County

Circuit Court _____ Spring _____ Term, 1962

The Grand Jury of said County charge that before the finding of this indictment: _____
William Stewart Rice.

Whose name is to the Grand Jury otherwise unknown. did, with theintent to steal, break into and enter a shop, store or warehouse, the property of Alabama Warehouse Company, Inc., a corporation, in which goods, wares, or merchandise, things of value, were kept for use, safe or deposit,

against the peace and dignity of the State of Alabama.

Exh- "E" Page 1

Sarnett
Solicitor of the Twelfth Judicial Circuit

No. _____

The State of Alabama
PIKE COUNTY

CIRCUIT COURT

Sping Term, 1962

THE STATE

vs.

William Stewart Rice

OFFENSE:
Burglary

INDICTMENT

Witnesses:

Grand Jury No. 46

A TRUE BILL:

William H. H. H.
Foreman Grand Jury.

Filed in open Court on the 13 day of

Feb., 1962

in the presence of the Grand Jury.

Robert Newman Jr.
Clerk.

Presented to the presiding Judge in open Court by the Foreman of the Grand Jury, in the pres-

ence of 17 other Grand Jurors, and filed

by order of Court this 13 day of

Feb., 1962

Robert Newman Jr.
Clerk.

It is ordered that the Clerk issue Capias for this named defendant and that the sheriff arrest the defendant and commit the defendant to Jail unless the defendant give bail in the sum

of \$ 500

J. H. H.
Judge.

I Robert Newman, Jr. Clerk & Register of the Circuit Court for Pike County, Alabama, do hereby certify that the foregoing is a true and correct copy of the original document in the above stated cause, which is on file and enrolled in my office. Witness my hand and seal this the 25 day of July 1962

Robert Newman Jr.
Clerk & Register

TROY PYS. CO. TROY, ALA.

Service of Copy of Indictment and List of Jurors on Defendant in Capital Case. 7840 Code.

The State of Alabama,
PIKE COUNTY

Circuit Court, Term, 19

I, Clerk of the Circuit Court in and for Pike County, Alabama, do hereby certify that the within and foregoing is a true, correct and exact copy of the Indictment returned by the Grand Jury of said County, against the within named Defendant.

Witness my hand and seal of office, this the

day of

19

Clerk.

T407 342

135

The State of Alabama, }
PIKE COUNTY

Before me Hugh Starling Justice of the Peace
for said County, personally appeared W.S. Furlow, As Sheriff Pike County, Alabama
who being duly sworn says on oath that he has probable cause for believing and does believe, that in Pike County,
within twelve months before making this affidavit William Stewart Rice, Alias
did with intent to steal break into and enter the
Graham Warehouse Co. Inc., in which goods, wares,
merchandise or other valuable things were kept for
lease, sale or deposit.

against the peace and dignity of the State of Alabama.

Sworn to and subscribed before me, this 5th
day of February 19 62

Hugh Starling J.P.

The State of Alabama }
PIKE COUNTY

To Any Lawful Officer of the State of Alabama, Greeting:

You are hereby commanded to arrest William Stewart Rice, Alias

and bring before me Hugh Starling, J.P.

to answer the State of Alabama of a charge of

Burglary

Preferred by W.S. Furlow As Sheriff Pike County, Alabama

Witness my hand this 5th day of February 19 62

Hugh Starling Justice of the Peace

OFFICE

5th 62

Sheriff

ated this warrant

February 62

resting the within named defendant and

bringing him
from Hugh Starling
and committing
him to jail in
without bail

H. H. Lumsden
Sheriff

Deputy Sheriff

No. Page

The State of Alabama,
PIKE COUNTY

JUSTICE COURT OF

Hugh Starling

THE STATE OF ALABAMA

William Stewart Rice, Alias

COMPLAINT AND WARRANT
OF ARREST

The Officer Arresting may admit the Defendant to Bail in the sum of

\$750.00 DOLLARS

Hugh Starling J. P.

STATE WITNESSES

J.E. Dean

Det. Jack Shows

Det. D.D. Collins

Lieut. John Williams

J.C. Parker

Curtis Bull

State Tax-collector Finley

Jeff Redmond

H. H. Lumsden

COURT OF

IN THE

The State of Alabama

PIKE COUNTY

PIKE COUNTY, ALABAMA

I Robert Newman, Jr. Clerk & Register of the Circuit Court for Pike County, Alabama, do hereby certify that the foregoing is a true and correct copy of the original document in the above stated cause, which is on file and enrolled in my office.

Witness my hand and seal this the 22nd day of February, 1962.

Robert Newman
Clerk & Register

Before me

Pike County, Alabama, personally appeared

who being duly sworn deposes and says:

I am the Sheriff of Pike County, Alabama.

In the case of the State of Alabama vs.

In the above mentioned Court, in executing the Warrant of Arrest or in arresting the said Defendant, I or one of my duly authorized Deputies traveled by the most direct route to the point of arrest and return, and

I am entitled to mileage at ten cents per mile to be taxed as costs in the case.

Subscribed and sworn to before me, this 19th day of 19

Disposition of Case

After considering the above affidavit made by the Sheriff of Pike County, Alabama, I, as the trial Judge of said Court, hereby approve the claim for mileage in the sum of \$ incurred in the making of the arrest or executing the Warrant of Arrest in the above styled cause and I hereby order the Clerk of the Court to tax the said sum as part of costs in the case.

This the 19th day of 19

Judge of the above named Court.

STATE TRIAL DOCKET

CASE NO. 6430

CIRCUIT COURT OF PIKE COUNTY

FEE BOOK

PAGE

ATTORNEYS	PARTIES	CHARGE	SHERIFF'S RETURN
h T. Fullner	THE STATE VI. William Stewart Rice	Burglary	2-13-62

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6 62 Deft. on arraignment in open court pleads guilty as charged in indictment. Formally adjudged guilty and is sentenced to penitentiary of Alabama for 2 years.

Erwin H. Hand
Circuit Judge

Defendant before being arraigned was asked the following questions, Have you employed Counsel or have you made arrangements to be represented, assisted and defended by Counsel in this case?

Answer: No
Are you financially able to employ an Attorney to represent, assist and defend you in this case? Answer: No
Do you desire the Court to appoint an Attorney to represent, assist and defend you in this case? Answer: Yes
It appearing to the satisfaction of the Court that Defendant in this case is indigent and desires legal Counsel, it is ordered and adjudged by the Court that Jackson W. Stoker, a practicing Attorney in this Court, be and he is hereby appointed as Counsel to represent, assist and defend Defendant in this case.

Erwin H. Hand Judge

I Robert Newman, Jr. Clerk & Register of the Circuit Court for Pike County, Alabama, do hereby certify that the foregoing is a true and correct copy of the original document in the above stated cause, which is on file and recorded in my office.

Witness my hand and seal this the 23 day of July, 1962

Robert Newman Jr.
Clerk & Register

Exh- "E" Page 3.

Date of Orders
Mo. Day Year

ORDERS OF COURT

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11 5 64

Defendant being present in open Court with counsel, on arraignment pleads not guilty to the charge and each charge embraced in the indictment. His case is set for trial Dec 2

1964

This the 5 day of Nov 1964

Conrad T. Ford Judge

12 3 64

Continued on Motion of Defendant Made in open Court by Lt. Pennington who was present with his counsel.

5 19 65

Lt. Pennington in open Court with his counsel, on arraignment pleads not guilty.

5 19 65

Jury and verdict finding Defendant guilty as charged. On Dec 1st of 1965 by Jury. Lt. Pennington sentenced to the Penitentiary for 5 years.

Lt. Pennington given notice of appeal. Amount of \$1000.00 suspended. Pending appeal. Bond on appeal is fixed at \$1000.00.

72 492

EXHIBIT "F"

IN THE

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF ALABAMA

NORTHERN DIVISION

Re: WILLIAM S. RICE,

vs.

Case No. 2583N.

CURTIS M. SIMPSON, Warden.

Before me, the undersigned authority, personally appeared Lewey Stephens, Jr., who after first being duly sworn says as follows: I am District Attorney for the 12th Judicial Circuit of Alabama and as such officer I prosecuted cases numbered 6427, 6428, 6429 and 6430 in the Circuit Court of Pike County, Alabama, in which cases the above-named William S. Rice, also known as William Stewart Rice, was defendant. These cases charged Rice with Burglary, 2nd degree under the law of Alabama.

Cases numbered 6427 and 6428 were tried before a jury on the 3rd day of December, 1964, and upon a verdict of Guilt the Court sentenced defendant to ten years in each case. On May 19, 1965, defendant was tried in case number 6430 before a jury which found him guilty and the Court sentenced him to five years.

I was informed by the Sheriff that the owner of the service station involved in the charge in case number 6429

had left Alabama, and as I remember, resided in North Carolina. Taking into consideration the distance involved, the other sentences and the fact that defendant had already served in prison between his original plea of guilty and his petition for writ of error coram nobis which had been granted, I moved the Court to nolle pros. Judge Eris F. Paul, the trial judge, concurred and the order was made. This motion was made by me with knowledge of the fact that the defendant had spent a vast majority of his adult life in prison, according to his FBI record.

LEWEY STEPHENS, JR.,
(Lewey Stephens, Jr.).

State of Alabama,
Coffee County.

Sworn to and subscribed before me this 25th day of
July, 1967.

GLADYS CLARK,
Circuit Clerk.

Order

[Filed August 4, 1967.]

IN THE

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF ALABAMA

NORTHERN DIVISION

(Title Omitted in Printing.)

Upon consideration of the return and answer and, in the alternative, motion to dismiss, filed on behalf of the respondent on August 3, 1967, it is the Order, Judgment and Decree of this Court that said motion to dismiss be and the same is hereby denied.

It is further Ordered that this cause be and the same is hereby set for a hearing on the merits commencing at 9:30 a.m., August 31, 1967.

The parties are Ordered and Directed to file briefs concerning the legal questions involved in this case, with this Court on or before August 30, 1967.

Done, this the 4th day of August, 1967.

FRANK M. JOHNSON, JR.,
United States District Judge.

Order

[Filed September 26, 1967.]

IN THE

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF ALABAMA

NORTHERN DIVISION

(Title Omitted in Printing.)

The petitioner, William S. Rice, by leave of this Court, files in forma pauperis his application for a writ of habeas corpus. He alleges that in the Circuit Court of Pike County in February 1962, upon pleas of guilty in four separate state Court criminal cases, he was sentenced to an aggregate of ten years in the state penitentiary.¹ Petitioner alleges, further, that in August 1964, his pleas and the judgment and sentence thereon in each of said state Court cases were set aside by the Circuit Court of Pike County, Alabama, upon his application for a writ of error coram nobis and the proof offered in support thereof. The basis for the state Court's action was that petitioner was not represented by counsel as constitutionally required by Gideon v. Wainwright, 372 U.S. 335. The petition now presented avers that in December 1964 he was retried in state cases Nos. 6427 and 6428, and upon conviction in the same circuit Court, before the same circuit judge, he was sentenced to a term of ten years in No. 6427 and ten years in No. 6428. Peti-

¹ In case No. 6427, he was sentenced to four years and in cases Nos. 6428, 6429 and 6430, he was sentenced to two years in each case; the sentences were to be served consecutively.

tioner further alleges that in May 1965 in case No. 6430, after conviction, he was sentenced to a term of five years. Case No. 6429 was nol-prossed on motion of the state solicitor in May 1965. Thus, the sentences, after petitioner was successful in his coram nobis proceeding and after he was retried and convicted in these second degree burglary cases—which, by statute in Alabama, carry a maximum sentence of ten years each²—now aggregate twenty-five years.

Petitioner contends that in resentencing him the State of Alabama, acting through the circuit judge of the Circuit Court of Pike County, Alabama, failed to give him credit for prior time served on the original sentence; and he alleges, further, that the sentences resulting in his present incarceration that were imposed by the Circuit Court of Pike County in December 1964 and in May 1965, which sentences amount to over three times the aggregate sentences originally imposed in said cases, violate his constitutional rights in that said greater sentences constitute punishment for his having exercised his right to and for having been successful in a post-conviction coram nobis proceeding. Petitioner contends that it is constitutionally impermissible for the State of Alabama to deny him credit for the time served on the void sentence and to force upon him the risk—here a reality—of more severe punishment as a penalty for his having exercised his right to and for having been successful in Alabama post-conviction proceedings. Petitioner did not present either of these issues to the Courts of the State of Alabama on the question of exhaustion of state remedies as a state prisoner is ordinarily required to do under 28 U.S.C. § 2254. Petitioner takes the position

² Title 14, § 86, Code of Alabama (1940) (Recomp. 1958).

that his case is one of "exceptional circumstances" in that there is an absence of available state corrective processes.

Upon an examination of the petition as presented, this Court, by formal order entered on July 17, 1967, held that 28 U.S.C. § 2254 did not bar the filing of petitioner's application for a writ of habeas corpus in this Court. In making this determination, the Court stated:

"Upon an examination of the petition as now presented and the excellently written argument filed in support thereof, this Court is of the opinion that petitioner is afforded no post-conviction remedies by the State of Alabama where his only contentions, in support of his claim that his present incarceration is unconstitutional, are (1) that he was not given credit on resentencing for prior time served upon sentences which were later set aside by the Courts of the State of Alabama as being unconstitutional, and (2) that the sentences resulting in his present incarceration were imposed as, and serve as, punishment for his having exercised and been successful in Alabama post-conviction proceedings. In this connection, Judge Cates, speaking for the Alabama Court of Appeals in *Aaron v. State*, 192 So. 2d 456 (Nov. 29, 1966), wrote:

"Moreover, we do not think that Alabama affords, after motion for new trial wherein the trial judge's power over judgment is kept alive, any post conviction remedy to assert that a sentence is invalid because of a claim of excessiveness if the second sentence does not go beyond the statutory limit. *Isbell v. State*, 42 Ala. App. 498, 169 So. 2d 27. Our Supreme Court has failed to adopt any general rule that

our remedy of coram nobis automatically assimilates all rights imposed on state trials by the Fourteenth Amendment. See Wilson, Federal Habeas Corpus and the State Court Criminal Defendant, 19 Vand. L. Rev. 741.'

And, again, the same Judge, speaking for the same Court, in March 1967 in *Ex Parte Merkes* [198 So. 2d 789, 790], reiterated the above-quoted statement from the Aaron case and stated further, 'We see no reason to go into what should be the rule of credit for prior time until we have to.'

"The above cases, appearing to represent the law of the State of Alabama upon the questions now presented in petitioner's application, make it apparent that Title 28, § 2254 of the United States Code, does not bar the filing of petitioner's application for the writ of habeas corpus as now presented."

Accordingly, the respondent Warden of Kilby Prison was directed to show cause why the writ of habeas corpus as prayed for by the petitioner, William S. Rice, should not be issued. Upon petitioner's request, the Honorable Oakley W. Melton, Jr., Attorney at Law, Montgomery, Alabama, was appointed to represent petitioner. The case was set for oral hearing before the Court, and now, upon the pleadings, the evidence, and the briefs and arguments of the parties, this Court proceeds to make the appropriate findings of fact and conclusions of law.

The evidence presented is uncontroverted. Petitioner's allegations as above outlined are admitted except the conclusions that he makes as to the reason for the imposition of greater sentences on being re-sentenced after his "successful" post-conviction proceeding. Petitioner was

originally sentenced in the four cases, Nos. 6427, 6428, 6429 and 6430, on February 16, 1962. He entered upon the service of the four-year sentence imposed in No. 6427 on February 16, 1962. He continued upon the service of this four-year sentence until the sentence was set aside by the Circuit Court of Pike County, Alabama, on August 28, 1964. Petitioner earned no statutory and industrial good time³ during this period of service by reason of infractions of prison rules. However, he did not lose any of the 2 years, 6 months and 12 days he had served on No. 6427 from February 16, 1962 until August 28, 1964. When petitioner was resentenced in December 1964 to ten years in case No. 6427, he was not given any credit on that sentence, nor on the other sentences imposed in Nos. 6428 and 6430, for the time he had previously served on the sentence in No. 6427 that had been declared void by the State of Alabama. As this Court stated in *Jesse Vincent Hill v. William C. Holman, Warden*, 255 F. Supp. 924 (1966):

"The constitutional requirements of due process will not permit the State of Alabama to require petitioner Hill, or any other prisoner for that matter, to be penalized by service in the state penitentiary because of an error made by the state circuit Court. Petitioner Hill was entitled to have the illegal sentence vacated. This, of course, was done by the Circuit Court of Jefferson County, Alabama, on September 8, 1964. He is also entitled to have the time he served on the erroneous sentence in case No. 91715 before it was vacated applied on the valid sentence that was imposed in that case by the Circuit Court of Jefferson County, Alabama, on September 8, 1964. This

³ See Title 45, §§ 253, 256, Code of Alabama (1940) (Recomp. 1958).

means very simply that Hill has more than served the legal sentence imposed upon him in case No. 91715. The record in this case is clear that, instead of Hill's owing the State of Alabama any additional time, the State of Alabama owes Hill for illegal incarceration for a period of between four and five years. He is due to be released immediately. *Youst v. United States* (5th Cir. 1945), 151 F. 2d 666; *Hoffman v. United States* (9th Cir. 1957), 244 F. 2d 378."

And the Fourth Circuit in *Patton v. North Carolina*, June 14, 1967, 35 Law Week 2737, stated:

"It is grossly unfair for society to take five years of a man's life and then say, we now acknowledge that this should not have happened, but we will set everything right by refusing to recognize that it did happen. . . ."

This rule of due process is applicable in this case and will not allow the State of Alabama to permit petitioner to be penalized by service in the state penitentiary because of an error the Circuit Court of Pike County made in case No. 6427. Petitioner Rice was constitutionally entitled to have the sentence imposed upon him in case No. 6427 (and also in cases Nos. 6428, 6429 and 6430) vacated. This, of course, was done by the Circuit Court of Pike County, Alabama, on August 28, 1964. He was also constitutionally entitled, upon being resentenced in case No. 6427, to be given credit for each of the days he had served upon the voided sentence that had been imposed on February 16, 1962. In addition, he was constitutionally entitled to any statutory and/or industrial good time allowance that he may have earned upon the service of the sentence in case No. 6427 from February 16, 1962 until August 28, 1964.

In this connection, see *Short v. United States* (D.C. Cir. 1965), 344 F. 2d 550.

The second issue presented in this case concerns whether the State of Alabama, acting through the Circuit Court of Pike County, Alabama, violated petitioner Rice's constitutional rights by subjecting him to more severe punishment upon his being resentenced in cases Nos. 6427, 6428 and 6430, after the prior sentences in these cases had been declared void and set aside in a post-conviction coram nobis proceeding initiated by Rice in the state Court. This Court, after considerable study, has concluded that a sentence imposed by a Court on retrial after post-conviction attack that is harsher than the sentence originally imposed—unless some justification appears therefor—violates the Due Process Clause of the Constitution of the United States. *Marano v. United States* (1st Cir., March 1967), 374 F. 2d 583.

In the *Marano* case, the defendant was convicted in the United States District Court for the District of Massachusetts. Upon appeal, the First Circuit Court of Appeals ordered a new trial. *Kitchell v. United States*, 354 F. 2d 715 (1st Cir. 1966). On the second trial, *Marano* was again convicted, and upon his second conviction he was given a five-year sentence as opposed to the three-year sentence in the first case. When this issue was presented to the First Circuit Court of Appeals, it was stated:

"As we have recently held, a defendant's right of appeal must be unfettered. *Worcester v. Commissioner of Internal Revenue*, 1 Cir., 1966, 370 F. 2d 713. So far as sentence is concerned, this principle cannot be restricted to those situations in which a defendant, in deciding whether to appeal, must con-

template the certainty of an increased sentence if he obtains a new trial and is convicted again. Not only must he not be faced with such certainty, *Worcester v. Commissioner of Internal Revenue*, *supra*, he likewise should not have to fear even the possibility that his exercise of this right to appeal will result in the imposition of a direct penalty for so doing. Accord, *Patton v. State of North Carolina*, W.D.N. Car., 1966, 256 F. Supp. 225, 80 Harv. L. Rev. 891. But cf. *Hayes v. United States*, 1957, 102 U.S. App. D.C. 1, 249 F. 2d 516, 517, cert. den. 356 U.S. 914, 78 S. Ct. 672, 2 L. Ed. 2d 586. But, equally, the judge should not be permitted to change his mind by deciding that he had been too lenient the first time, as was suggested here during oral argument, or, if a new judge, by having a different approach towards sentencing. We do not approve the contrary decision in *Shear v. Boles*, N.D.W. Va., 2/3/67, 263 F. Supp. 855, cited to us by the government. Such possibilities, if they had to be recognized, might well be substantial deterrents to a decision to appeal." [Footnotes omitted.]

In *Patton v. North Carolina*, in dealing with this question of a more severe sentence being imposed when a defendant is resentenced after post-conviction proceedings have resulted in voiding the original conviction, the Fourth Circuit stated:

"The risk of a denial of credit or the risk of a greater sentence, or both, on retrial may prevent defendants who have been unconstitutionally convicted from attempting to seek redress. For this reason the district Court declared that predicating [defendant's] constitutional right to petition for a fair trial on the

fiction that he has consented to a possibly harsher punishment, offends the Due Process Clause of the Fourteenth Amendment. * * *

"The district Court held that [defendant's] punishment could not be increased unless evidence justifying a harsher sentence appeared in the record, and that the state must bear the burden of showing that such facts were introduced at the second trial, since 'where the record disclosed no colorable reason for harsher punishment,' the effect would be to inhibit the constitutional right to seek a new trial. * * *

"We do not think, however, that a defendant's rights are adequately protected even if a second sentencing judge is restricted to increasing sentence only on the basis of new evidence. We are in accord with the First Circuit, *Marano v. U.S.*, 35 LW 2580, which has recently held that a sentence may not be increased following a successful appeal, even where additional testimony has been introduced at the second trial. * * * *Contra*, *Staerner v. Russell*, 35 LW 2706. * * *

"In order to prevent abuses, the fixed policy must necessarily be that the new sentence shall not exceed the old. Seldom will this policy result in inadequate punishment. Against the rare possibility of inadequacy, greater weight must be given to the danger inherent in a system permitting stiffer sentences on retrial—that the added punishment was in reaction to the defendant's temerity in attacking the original conviction. Even the appearance of improper motivation is a disservice to the administration of justice. * * *

"North Carolina strictly forbids an increase in a defendant's sentence after the trial Court's term has

expired and service of sentence has commenced. Thus the threat of a heavier sentence falls solely on those who utilize the post-conviction procedures provided by the State. If the state wishes to institute a system permitting upward revision of sentences, it must proceed upon a rational basis in selecting the class of prisoners it will subject to this threat. It may not discriminate in this regard against those who have exercised the right to a fair trial. This is an arbitrary classification offensive to the Equal Protection Clause. . . ."

The Patton case is peculiarly applicable here from a factual standpoint. In 1960 Patton, without the aid of counsel, entered a plea of *nolo contendere* to a charge of armed robbery and was sentenced to twenty years in prison by the North Carolina state Court. In 1965 Patton sought post-conviction review, and on the basis of *Gideon v. Wainwright*, 372 U.S. 335 (1963) (as petitioner Rice did in the Circuit Court of Pike County in this case), obtained a new trial at which time Patton was found guilty of the same offense. The judge sentenced him to twenty years, stating, "I would give you five more years than what I am giving you, but I am allowing you credit for the time that you have served." Patton applied to the United States District Court for the Western District of North Carolina for habeas corpus, claiming that the harsher sentence was a denial of due process and equal protection. The district Court held that petitioner must be released unless properly sentenced and, further, that to impose a sentence equal to that given under a previous void conviction is either to deny credit for time served under the previous sentence or to impose a longer sentence. The district Court further held that to deny Patton

credit for the time he had served was a violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment, as is the imposition of a harsher sentence unless the record shows some justification for it. The Fourth Circuit, in reviewing this case, did not agree with that part of the district judge's reasoning to the effect that it was constitutionally permissible to impose a harsher sentence upon retrial if some justification is shown for it. On this point, the Fourth Circuit Court of Appeals stated:

"We are in accord with the First Circuit in *Marano v. United States*, 35 Law Week 280, which has recently held that a sentence may not be increased following a successful appeal even where additional testimony had been introduced at the second trial."

This Court does not believe that it is constitutionally impermissible to impose a harsher sentence upon re-trial if there is recorded in the Court record some legal justification for it.⁴

⁴ "Where a heavier sentence is imposed [following a 'successful' appeal] the burden is upon the state to build a record to support the imposition of harsher punishment." *Gainey v. Turner*, 266 F. Supp. 95, 103 (E.D. N.C. 1967) citing *Patton v. North Carolina*, 256 F. Supp. 225, 235 (W.D. N.C. 1966), *aff'd* — F. 2d — (4th Cir. 1967). See also *Marano*, *supra* at 585, where the First Circuit held that while it is impermissible to consider evidence of aggravating circumstances arising out of evidence of the crime it is nevertheless permissible to consider other facts made known to the sentencing Court which would have a legitimate bearing on the imposition of sentence. "We do not think it inappropriate for the Court to take subsequent events into consideration, both good and bad." *Shear v. Boles*, 268 F. Supp. 855 (N.D. W.Va. 1967), to the extent that it holds that in cases such as this the burden is on the person attacking the second harsher sentence to show that it was motivated by impermissible factors, is rejected.

Unless the reasons for the imposition of a harsher sentence affirmatively appear of record, it cannot be presumed that the

Here, the State of Alabama offers no evidence attempting to justify the increase in Rice's original sentences in cases Nos. 6427, 6428 and 6430 imposed on February 16, 1962 (which sentences totaled eight years to run consecutively), to a ten-year sentence in No. 6427, a ten-year sentence in No. 6428, and a five-year sentence in No. 6430, which sentences are also to run consecutively. It is shocking that the State of Alabama has not attempted to explain or justify the increase in Rice's punishment—in these three cases, over threefold.

The basic concept of due process makes it unfair for the State of Alabama to imprison Rice in February 1962, to offer him the right to post-conviction review⁵ to test and set aside constitutionally defective sentences, and then to subject him to greater punishment—three times greater than originally imposed—if he successfully exercises that right. Under the evidence in this case, the conclusion is inescapable that the State of Alabama is punishing petitioner Rice for his having exercised his post-conviction right of review and for having the original sentences declared unconstitutional.

An equally strong basis upon which the harsher sentences imposed by the Circuit Court of Pike County in these cases are unconstitutional is that they violate the Equal Protection Clause of the Fourteenth Amendment

motives which prompted the imposition of such a sentence are constitutionally permissible. Cf. *Carnley v. Cochran*, 369 U.S. 506, 82 S. Ct. 884, 8 L. Ed. 2d 70 (1962); *Johnson v. Zerbst*, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938).

⁵ In Alabama, this review is by writ of error coram nobis. See *Wiman v. Argo*, 308 F. 2d 674, 677-78 (5th Cir. 1962). This method of post-conviction review in lieu of habeas corpus is constitutionally permissible. *Taylor v. Alabama*, 335 U.S. 252, 261, 68 S. Ct. 1415, 92 L. Ed. 1935 (1948).

to the Constitution of the United States. *Patton v. North Carolina*, supra. In Alabama, there can be no increase in a sentence in a criminal case after the sentence is imposed. This is a protection that is given to all convicted criminals in this state. To deny such protection to convicted criminals who elect to exercise their post-conviction remedies and who do so successfully is unfair discrimination and does nothing except serve to limit the use of post-conviction proceedings in the Alabama state Courts by prisoners. It denies the prisoner the protection of his original sentence as a condition to the right of appealing his conviction, or exercising his post-conviction remedies. Such a denial is constitutionally impermissible when the risk of a harsher sentence—as it is if the position of the State of Alabama is to be sustained—is borne exclusively by those who pursue their appellate rights of post-conviction remedy. Cf. *Smartt v. Avery*, 370 F. 2d 788 (6th Cir. 1967). It is basic to the theory of equal protection that the imposition of harsher treatment on prisoners solely because they successfully pursue available post-conviction remedies cannot possibly bear any rational connection with any legitimate state interest. In order to protect this constitutional right, the original sentence, which the state may no longer challenge of its own accord, must operate as a ceiling for any sentence subsequently imposed following the successful post-conviction proceeding and retrial of the accused for the same offense. This means that, in the absence of some showing of necessity or justification, the maximum sentence that could be constitutionally imposed upon petitioner Rice in state Court case No. 6427 after his reconviction in December 1964, was four years and in case No. 6428, two years and in case No. 6430, two years. This Court, in the absence of some competent evidence, cannot accept the contention that the state makes in this case that case

No. 6429 was nol-prossed in order to compensate petitioner for the time served on the illegal sentence imposed on February 16, 1962 in case No. 6427. On the contrary, when the illegal sentences were set aside in August 1964—including the one entered in case No. 6429—and the state was put to its proof, the nol-pros was entered for some reason other than a sympathetic one toward Rice. In all probability, the answer lies in the circuit solicitor's affidavit that the state attached to its return and answer in this case, which indicates that the solicitor was "informed by the Sheriff that the owner of the service station involved in the charge in case number 6429 had left Alabama, and as I remember, resided in North Carolina." The imposition of sentences totalling three times greater than those originally imposed permits no other reasonable explanation as to the abandonment of the prosecution in case No. 6429.

In summary, the State of Alabama must give petitioner Rice credit for the time he served upon the illegal sentence imposed in February 1962 in state Court case No. 6427. Additionally, the State of Alabama must give petitioner Rice credit for the time he has served to date on case No. 6427 imposed in December 1964. In this connection, Rice, as noted above, served 2 years, 6 months and 12 days on the sentence imposed in No. 6427 before that sentence was voided by the state circuit Court. Since being resentenced in December 1964 in No. 6427, Rice has served an additional 1 year, 10 months and 26 days; and since being resentenced in No. 6427, he has earned 9 months and 26 days "good time." Thus, Rice has, as of August 31, 1967, actually served 4 years, 5 months and 8 days on the four-year sentence as originally imposed in No. 6427. If given credit for his "good time"—and this credit must be given—Rice has, as of August 31, 1967, served the equiva-

lent of 5 years, 3 months and 4 days on this four-year sentence. Rice is entitled to be released immediately from any further incarceration by reason of the sentence imposed by the Circuit Court of Pike County in state Court case No. 6427. Furthermore, Rice is entitled to have credited to the two-year sentences—the maximum constitutionally valid in Nos. 6428 and 6430—the time served on No. 6427 that exceeds four years.

In accordance with the foregoing, it is the Order, Judgment and Decree of this Court that the petitioner, William S. Rice, is presently illegally incarcerated by the respondent, Curtis M. Simpson; Warden of Kilby Prison, by reason of the sentence imposed by the Circuit Court of Pike County, Alabama, in state Court case No. 6427 in December 1964.

It is Ordered that William S. Rice be discharged immediately from the custody of the State of Alabama and the custody of Curtis M. Simpson as Warden of Kilby Prison, Montgomery, Alabama, which custody is or may be pursuant to the conviction and judgment of the Circuit Court of Pike County, Alabama, in state Court case No. 6427 rendered and imposed in December 1964.

It is further Ordered that the costs incurred in this proceeding be and they are hereby taxed against the respondent, for which execution may issue.

Done, this the 26th day of September, 1967.

FRANK M. JOHNSON, JR.,
United States District Judge.

* To the extent that *Newman v. Rodriguez*, 375 F. 2d 712 (10th Cir. 1967), is to the contrary, this Court declines to follow it for the reasons stated in *Hill v. Holman*, 255 F. Supp. 924 (M.D. Ala. 1966).

Transcript of Proceedings

[Filed October 6, 1967].

IN THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION
Civil Action No. 2583-N.

WILLIAM S. RICE,

vs.

CURTIS M. SIMPSON, Warden, Kilby Prison,
Montgomery, Alabama.

Before:

HON. FRANK M. JOHNSON, JR., *Judge*,
at Montgomery, Alabama, August 31, 1967.

Appearances:

For Petitioner: Oakley W. Melton, Jr., and Thomas S. Lawson, Jr.

For Respondent: Paul T. Gish, Jr.

(The above case coming on for hearing at Montgomery, Alabama, August 31, 1967, before Hon. Frank M. Johnson, Jr., Judge, the following proceedings were had):

The Court: Rice against Simpson, petitioner ready?

Mr. Melton: Yes, sir; we are ready, your honor.

The Court: How about the Respondent?

Mr. Gish: Yes, your honor.

The Court: Do you have witnesses?

Mr. Melton: Yes, sir.

The Court: Will you ask them to come around so they can be sworn.

Mr. Melton: Mr. Dean.

[2] Marshal: All witnesses, please come around.

The Clerk: All witnesses, please raise your right hands. You and each of you do solemnly swear that the testimony you give in this cause to be the truth, the whole truth, and nothing but the truth, so help you, God.

The Court: Do you want the rule invoked?

Mr. Melton: No, sir; we are going to take Mr. Dean first.

Mr. Gish: No, sir.

The Court: You want the rule?

Mr. Gish: No, sir.

The Court: All right; just have a seat.

Mr. Lawson: Want us to take the first witness, Your Honor?

The Court: Yes, you have the burden.

Mr. Melton: All right, sir. Mr. Dean.

Mr. Lawson: He is on the—on the stand.

Mr. Melton: Excuse me; go ahead, Tom.

M. S. DEAN, witness for Petitioner, having been duly sworn, testified as follows:

Direct Examination by Mr. Lawson:

Q. Please state your name, sir? A. M. S. Dean.

[3] Q. Mr. Dean, what is your occupation? A. Record Clerk for the State Board of Corrections.

Q. As Record Clerk of the State Board of Corrections, is it your job to keep records on each individual prisoner in the Kilby Prison? A. Yes, it is.

Q. Is it also your job to keep up with the statutory good time and the industrial good time earned by each of the prisoners? A. Yes, it is.

Q. Will you please explain to the Court how the statutory good time and industrial good time works? A. Your statutory—is two different types of good time. Statutory starts out with six days anytime up to a year, and seven days a month from anything over a year up to three years, and eight days—no, I am wrong in that. It is six days a month from a year and a day—I mean from a year up to three years, seven days a month from three year—three years up to five years, eight days a month from five years up to ten years, and anything over ten years is ten days a month, a third of his time.

Q. Now, Mr. Dean— A. Wait a minute; industrial good time.

Q. All right; yes, sir? A. Your industrial good time is three days for the first year, four days for the following four years, and five days—

The Court: Three days per month when the sentence is [4] just up to one year; is that what you mean?

Witness: No, sir; industrial good time is not—

The Court: Doesn't depend—

Witness: —according to length of time.

The Court: Doesn't depend on length; all right.

He gets three days a month for the first year he is in, regardless of the length of his sentence?

Witness: Right.

The Court: Go ahead.

Witness: Now, Judge, we have a rule, it is a—that he has to serve a ninety-day period before he can start earning the three days.

The Court: All right.

Witness: From then on, he earns four days a month, and from the fifth year on, he earns five days a month. That is from memory; I believe I am correct on that, Judge.

Q. Now, Mr. Dean, the information that you have just given us is set out in the Alabama Code, is it not, in Title 45, Sections 253 through 256? A. It is set out in the Code; I don't remember what section; it is in Title 45, I don't remember what section.

Mr. Lawson: We refer the Court to those particular provisions.

Q. Mr. Dean, you mentioned that the industrial good time does not begin until after he has been in the penitentiary for ninety days? [5] A. That is correct.

Q. And this is computed on the basis of certain work that he does in the prison system, is it not? A. Well, originally, the law was set up for that; but we received, or the Attorney General gave us a ruling that the—when the man is

working, as long as he is working or—or performing his duties in prison, we could give it to everybody. It was originally set up for industries, but the—we are—I—I got a ruling from the Attorney General that as long as a man was performing his duties or working, we could give it to everyone.

Q. Well, then, as a matter of course, is this industrial good time given to the prisoners in an administrative manner—I mean the time that they serve is computed, and this particular amount of time is deducted from their sentence so long as they are working? A. Yes; yes; as long as he does not violate any prison rule.

Q. All right; with respect to violation of prison rules, are you speaking, now, of good conduct time or industrial production time? A. Both; both times.

Q. Well, with respect to this limitation, so long as he is performing well and is not in trouble, suppose a person was sentenced for thirty years in prison, and the first day he was there, he got in trouble, but thereafter he was—his conduct was perfect; would he be—would he therefore lose all of these benefits to which he was entitled? A. No, sir; it's—it's—the type of rule he violates depends on [6] how much time is taken.

Q. Right; now, they would take this time when he is punished or when he gets in trouble from the time he has earned—I mean the deductions he has already earned, wouldn't they? A. Well, either that or make it so he couldn't earn that much time; if he doesn't have that much time to take, we fix it so he couldn't earn that much time.

Q. Well, with these particular rulings made by you people at Kilby, when a person gets in trouble or in computing the amount of good time, both industrial and statutory, to

which he may be entitled, would that be reflected in your records? A. Yes, it would.

Q. Is it computed on a month to month basis? A. No, sir; it is just computed when he violates the prison rule and his good time is taken, or on that basis.

Q. So you would have a record of any violation of the rules, any deductions from his good time? A. That's right.

Q. And if you had one or two, and no others were listed on your records, then he would be entitled to all of the statutory and industrial good time which he had earned less the particular amount set out in your records? A. That's right.

Q. As punishment? A. That is correct.

[7] Q. Mr. Dean, I will show you a mimeographed sheet, which we will list as Petitioner's Exhibit 1, and ask you to identify it, please, sir? A. This is a form that shows these—amount of sentence, and this is statutory good time deductible, or lists what—shows what it to be and industrial good time to be.

Q. Is this printed at Kilby Prison? A. I couldn't tell you that.

Q. You have never seen one like this before? A. I have never seen that one before.

Q. Do you have one similar to this that you work with in your— A. It is similar to that, but I can't say that was printed at Kilby or—or where it was printed.

Q. Well, do you have forms such as these? A. We have a form that we use in the office.

Q. But it does not appear to be this particular form? A. No, sir; it does not.

Q. Do you have one of the forms which you use in your office with you? A. I do not.

Q. However, such a form—does it just reflect the—an easy method of determining the computations under the statute; is that the purpose? A. Yes, this—when the law was first passed, we went through and worked up the time that a man would—could earn on any given sentence, on both statutory and industrial good time.

Q. Nevertheless, without one of these sheets or one similar to this, [8] you could compute the amount— A. Yes.

Q. —of industrial or good time? A. That is correct.

Q. Now, Mr. Dean, do you have with you the records referring to the petitioner which have been kept at Kilby Prison? A. I do.

Q. Would you refer to those records, please, sir and tell us whether Mr. Rice's conduct during the time that he has been in Kilby Prison, since his first conviction in 1962, has been such as to entitle him to receive any credit for or deductions for industrial time and statutory good time? A. Well, now, what sentence are you talking about?

Q. Well, what I am referring to, now, is anything in your records which would reflect a deduction—a limitation on the deductions for which he would be entitled. As I understand your testimony, these prisoners are entitled to these deductions as a matter of course unless a notation is made in your records penalizing them for certain conduct.

The Court: His question had to do with which sentence are you interested in; are you interested in the ones that were set aside in August '64, or the ones imposed later?

Mr. Lawson: Well, we will start with the earlier ones, Your Honor—

Q. —and then we will ask you about the later ones? [9]

A. The records indicate on the sentences that were set aside he had two disciplinary actions with two penalties.

Q. All right; does the—do your records indicate the number of days that he was penalized? A. Penalized a total of fifteen months.

Q. That means for fifteen months he could earn no good time? A. No; it means that that much good time was taken away from him, that he couldn't earn that much good time.

Q. Oh; do you have the dates referring to these particular violations?

The Court: Well, it must be some misunderstanding; he just stayed in from '62 to '64 in those sentences; I don't see how he could have lost fifteen months in two years.

Witness: Well, Judge, the law states that—that the Department has the authority to give—

The Court: Well, he couldn't accumulate—

Witness: —let him earn—with good conduct.

The Court: He couldn't accumulate fifteen months industrial and statutory good time in two years, could he?

Witness: No, sir; but the law states that the Department can—that he can't earn—that the Department set up a period that he couldn't earn that much time.

The Court: Well—then that means for fifteen months he did not earn any good time; is that what that means?

Witness: No, sir; it means we penalized him the [10] fifteen months, Judge; he might not—might

take him longer than the fifteen months to earn the fifteen months, see.

Q. Well, wouldn't it as a matter of course take him considerably longer than fifteen months to earn fifteen months good time? A. You cannot earn fifteen months good time on fifteen months; that will be a day for day basis.

Q. Is it my understanding that you penalize a man not only for the industrial good time, but also for the good conduct good time before he's even earned the—this time?

A. That is correct, set it up to where—

Q. And that a person— A. —he cannot earn it.

Q. And that if a person has served one year in prison and gets in trouble, still has nine years to go on a sentence, then you could penalize him for that one violation for all of the remaining time that he has in prison? A. Well, I—I guess you could, but we don't; depends on the type of violation.

The Court: Do you have that computation made, Mr. Dean, on those three sentences that were set aside, 6427, 28, 29—maybe there were four of them—and 30?

Witness: Yes, sir; four cases, total of ten years.

The Court: To be served concurrently?

Witness: No, sir; consecutively.

The Court: How much was he sentenced, according to [11] your records, in 6427?

Witness: 6427 was four years.

The Court: All right; and 6428?

Witness: Let me go back to my transcript to be sure on that, Judge, so it won't—let's see, 6428 is two years.

The Court: And 29?

Witness: It is two years.

The Court: And 30?

Witness: It is two years.

The Court: A total of ten?

Witness: Yes, sir.

The Court: To be served consecutively?

Witness: Yes, sir.

The Court: All right. Go ahead, Mr. Lawson.

Q. Mr. Dean, referring to the statute which sets out these deductions, would it be correct to say that a person sentenced to ten years in jail would be entitled to approximately three years and four months statutory good time and nine months and sixteen days industrial good time? A. Yes.

Q. Then what you have done on the basis of these two instances in which he got in trouble is take from this deduction one year and three months? A. That is correct.

Q. And that was a penalty imposed prior to the time he had anything [12] you could really penalize him for? A. Well, that is correct.

Q. I mean he had not earned all of this time? A. He had not earned it all.

The Court: May I ask a question?

Mr. Lawson: Yes, sir.

The Court: Was that penalty imposed during the first sentence he was serving?

Witness: Yes, sir; it was. We do not—

The Court: Did the penalty relate to other sentences—

Witness: No, sir.

The Court: —that had been imposed that he was not yet serving?

Witness: No, sir.

The Court: Then the fifteen months that he was deprived was on the four-year sentence?

Witness: Yes, sir; we do not take any good time except on that one case he is serving on; we do not go into any cases beyond that one case.

Q. Then I will ask you this, Mr.—

The Court: What was the maximum he could have earned on a four-year sentence?

Witness: Judge, I believe it would be one year, seven months, and twenty-three days.

The Court: Then all that he could have possibly [13] earned was revoked administratively except about four months?

Witness: Yes, sir; that is correct.

The Court: All right; go ahead. Incidentally, what was that for, escape?

Witness: Escape and—let's see what the other one—escape and gambling in the cell.

Q. Do you have the dates of those offenses? A. Well, the gambling in the cell was dated on January 15, '63, and the escape was on March 8, '62.

Q. And please tell me on the first one, on the gambling charge, how much was he penalized? A. Two months.

Q. And on the escape, I assume he was penalized thirteen months? A. Thirteen months.

Q. Do your records show when he was admitted to Kilby Prison? A. He was sentenced on the original four cases was set aside on February 16, '62.

Q. So this occurred—his first offense occurred less than a month after he had been in Kilby Prison? A. Well, it occurred—escape occurred on March 8, '62.

Q. He was—and he was convicted on February 16, '62?

A. That is correct.

Q. And at that time, he had earned no good time and no industrial days; is that correct? A. At that time, he had not.

[14] Q. And yet he was penalized thirteen months? A. That is correct.

Q. Now, Mr. Dean, let's go to the time which he has put on—has put in in connection with his second sentences, and please check your records and tell me if he has any offenses or violations during that time for which he has been penalized? A. There is no penalties on those—on these last cases sentenced in October, '65.

Q. And, Mr. Dean, assuming that a person had been committed to the penitentiary for eight years, am I correct in stating that he would have earned or be entitled to a total of two years, one month, and eighteen days statutory good time and eight months, sixteen days industrial good time? A. If that form is correct, it would be. I am not—I am not saying the form is not correct or it is correct.

Q. Well, would you compute that for me, please, sir? If you would like to have the statute, I have it here (presented). A. If I haven't made an error, looks like he would serve five years, ten months, and fourteen days, if I haven't made an error on it.

Q. Well, I asked you to figure out the amount of good time to which he would be entitled; that would be the difference between eight years and the figure you just gave me? A. No; this includes all—all the good time, industrial and statutory.

Q. You say five years, two months, and eight days?
 [15] A. Five years and ten months and fourteen days, if I haven't made a mistake on it.

The Court: That is on the new sentences?

Witness: No, sir this is on the original eight years.

Mr. Lawson: Judge, this was a question I gave him, assuming a person had been committed to the penitentiary for eight years, now much of that—how much credit could he get for good time and industrial time?

A. Well, now, he would—he would have to serve five years, ten months, and fourteen days, and, of course, take that from eight years would give you the amount of good time that he could earn.

Q. And from the amount of this good time would be deducted any penalties which he had received during the course of— A. That is correct.

Q. —the five years that he had been in jail? A. I might mention that we—that we aggregate a man's sentences to give him credit, so he would receive as much good time as a man with just a straight eight-year sentence.

Q. Yes, I understand, that is in accordance with the statute that— A. Yes.

The Court: May I ask a question at this point. What sentence was he serving when he lost his fifteen months, the sentences imposed February, '62, what sentence was he serving?

Witness: He was serving on case number 6427, the four-year sentence for burglary.

[16] The Court: All right. He never did get—enter upon service of 6429?

Mr. Lawson: No, sir; no, sir.

Witness: I don't believe it was, just the—let me check and see.

The Court: The reason I am asking, Mr. Gish, in his response, says that this is the reason that it was nol-prossed, that he served part of 6429.

Mr. Gish: If Your Honor—

The Court: I just wondered how he got the 6429 without serving 27 and 28.

Mr. Gish: If Your Honor please, I did—I didn't mean that he served that case; I meant in my response that because of the service of time, that one of the cases, which happened to be 29, was nol-prossed. It was not because he had served that particular case. He had served in 27; it was 29 that was nol-prossed.

The Court: I take it, then, the Circuit Court here in Pike was attempting to—to give him credit for the time he had served on any sentences to be imposed; is that what they were trying?

Mr. Gish: It was according to the statement of the District Attorney, which is an Exhibit to the return that is what he told me, Your Honor.

The Court: Can I assume from that that there wasn't any reason for him to be punished by the Court in imposing greater sentences when he came back before it if they were giving him credit [17] for the time he served?

Mr. Gish: I don't think this case, Your Honor, can be decided on that basis. I think just as a practical matter—I am trying to show that in this case, that as a practical matter, he did receive some consideration because of the time he has spent that he

would not get credit for; I don't think that it was necessary that the case be nol-prossed.

The Court: Do you have some evidence to show why he was given sentences totaling three times greater the second time than he was the first time?

Mr. Gish: No, sir. I think, sir, that it should be considered in the—the first sentences were on pleas of guilty, and the last sentences were after trial on pleas of not guilty.

The Court: Is that—does that mean that if you do not plead guilty and go to trial and get convicted, you get more severe sentences than if you plead guilty?

Mr. Gish: I can't say that that would be true. I don't know, sir. I think that it is common knowledge that a man may in many instances plead guilty and— and get a lighter sentence than he would otherwise.

The Court: Well, is that what happened here?

Mr. Gish: I don't know, sir.

The Court: Do you have any evidence on that point?

Mr. Gish: No, sir; I do not, sir.

Mr. Lawson: Your Honor, we point out that when he [18] pled guilty the first time, he did not have counsel, and the writ of error coram nobis was granted for that reason.

The Court: I have that before me.

Q. Mr. Dean—

The Court: Should I attach any significance to your statement that the only basis, as far as you know, for him getting sentences totaling three times greater the second time was that he went to trial the second time?

Mr. Gish: Your Honor, I am afraid I am getting into an argument here that—

The Court: I don't intend to argue; I am trying to get information. I am startled; I am startled and shocked—

Mr. Gish: Your Honor—

The Court: —by the fact that a man gets ten years in four cases on the first time, he files a coram nobis and gets them set aside, and he goes back, and one of them is nol-prossed, and then the three remaining cases, he gets twenty-five years in the same Court.

Mr. Gish: That is right, Your Honor. I know—

The Court: Does that shock you?

Mr. Gish: No, sir; I think—I think, Your Honor, that on a plea of guilty, a man comes in and says, "Judge, I am guilty, I admit"—in effect, he says, "I—I admit that I did wrong; I am asking for leniency; there is no use to try me; I am guilty." I think that many times, Your Honor, a trial Judge is justified in giving the man a lower sentence than he would if he came [19] in and after being presumed innocent had to be proven guilty, all the time maintaining that he was innocent. I think in this particular—particular case, we must assume after pleas of guilty on one hand, and pleas of not guilty on the other hand, and convictions in both instances, we must assume that this man was undoubtedly guilty. Now, when he comes in—

The Court: (Nodded to indicate affirmative reply.)

Mr. Gish: —in one instance and admits his guilt, I think that is a long way toward rehabilitation, toward maybe this man is going to straighten out;

maybe with a light sentence he will learn his lesson, so to speak, and he will come out and make a good citizen. Now, I am not saying, Your Honor, that that would happen in a hundred per cent of the cases. I—I don't know, and no man knows whether it would in a particular case. But I do say, Your Honor, that a trial Judge would be justified in taking a guilty plea into consideration as opposed to a not guilty plea.

The Court: (Nodded to indicate affirmative reply.)

Mr. Gish: To me, it makes sense, Your Honor.

The Court: (Nodded to indicate affirmative reply.)

Mr. Lawson: Your Honor, with respect to the rehabilitation which he has just mentioned, I would point out that, of course, the purpose of—one of the purposes of the prison system is to rehabilitate prisoners. In—in this instance, they sentenced him to twenty-five years without giving him any credit for the time that he had spent in the penitentiary before; and assuming that the [20] purposes of our prison system are in any way being accomplished, it would certainly seem that he would be entitled to less, rather than more.

The Court: Well, I started this by inquiry of Mr. Gish concerning why one of them was nolle prossed, and it is a little premature; it is before you get through with your evidence; so I will hear you on your moral aspects of your case later.

Q. Mr. Dean, my figures disagree somewhat with yours that I have on this sheet which I showed you; I wonder if you could provide the Court with a—one of your forms that you use in the office? I know that I have asked you to make hasty computations. A. Yes, I will be glad to.

Q. So that we may be sure that in computing this particular time that it is accurate.

Mr. Lawson: That's all, sir.

Cross Examination by Mr. Gish:

Q. Mr. Dean—

Mr. Gish: Excuse me.

The Court: (Nodded to indicate affirmative reply.)

Q. Mr. Dean, after this man was retried and resentenced and sent back to Kilby, was there or was there not any computation required or done when he first came back? What I am trying to get at is was there anything carried over into these new sentences in the way of good time or deductions from good time? [21] A. No, sir; when one case is set aside or he completes one case, that is it; we do not take any good time from a succeeding state—case or any additional cases on him.

Q. When he came back and was resentenced on May 18, 1965, in case number 6430, he came in as a new deal, so to speak, just like a new sentence? A. Yes, we received him as a new individual.

Q. All right. Now, I believe you mentioned in some testimony earlier that you compute "good time" so that a man who has one ten-year sentence and a man who has five two-year sentences would be entitled to the same deductions? A. That is correct: any individual gets the same amount of time as any other individual with the same amount of time, whether you got five cases, three cases making a total, or what not.

The Court: Whether they are concurrent or consecutive?

Witness: Well, concurrent is the same; I mean, of course, he serves that with another sentence, but they do get the same amount of time.

Q. A man serving a concurrent—serving two sentences concurrently, say of ten years each, would he be entitled to any more good time than a man who had just one ten-year sentence? A. No; anytime a man receives ten years, anything over ten years everything is the same amount of good time.

The Court: Ten days a month?

Witness: Yes, sir.

[22] Q. Now, I believe you stated that a penalty in one case is not carried over into any subsequent sentences; is that correct? A. It is not unless he is serving a concurrent case; it would have to be carried over to that concurrent case.

The Court: Of course, mathematically, that is impossible, because he doesn't get through serving his first sentence—

Witness: That—

The Court:—until he pays what he owes!

Witness: That is correct.

The Court: You have nothing to carry over?

Witness: No, sir.

Mr. Gish: I believe that is all, Mr. Dean.

Redirect Examination by Mr. Lawson:

Q. Mr. Dean, do you recognize this as a—Exhibit 1, Petitioner's Exhibit 1, as being one of the forms used in the

Classification Office at Kilby Prison? A. No, sir; I do not, because I don't know what Classification Officer used.

Q. Do you have any reason to doubt that this is not correct; could you look at it and tell us whether it is correct? A. I—I cannot off hand go down and figure all the good time on—on that many years and tell you whether it is right or not; I don't particularly have any reason to doubt it.

[23] The Court: You are going to make that computation for me?

Witness: Yes, sir; I will send you a copy, Judge.

Mr. Gish: Have you introduced that Exhibit?

Mr. Lawson: No; we have not.

Mr. Gish: All right.

By Mr. Lawson:

Q. Mr. Dean, do your records reflect whether the petitioner was given any credit for the prior service, for his prior service in Kilby Prison when he was resentenced?

A. No, sir. I do not.

Q. Do your records reflect whether he was given any credit for good conduct or industrial time earned while he was serving in the penitentiary for the first time when he returned after his resentencing? A. You mean given credit on the new sentence?

Q. Yes? A. No, sir.

Mr. Lawson: That's all.

The Court: As a matter of fact, your records show he didn't earn any on the first sentences; is that right?

Witness: Not—Judge, when a man—when he sets the sentence aside and he comes back under these

new cases, that is what we have to figure that man up on.

The Court: If it hadn't been set aside, he still wouldn't have earned any, because he forfeited fifteen months in two. [24] years?

Witness: When he has earned three or four months, the balance of it on that first four years—

The Court: He just served two years.

Witness: Well, that is true; he couldn't earn any just by serving, but if he had completed, he would have served.

By Mr. Lawson:

Q. Assuming he had been entitled to any, would he, under your present system, have been credited with good time earned during his first sentence when he was resented? A. Not on our records; we couldn't do that.

Mr. Lawson: That's all.

Recross Examination by Mr. Gish:

Q. Mr. Dean, when a man has two sentences, sentence A and sentence B, and he is serving sentence A, if he goes back on coram nobis, and that sentence is set aside, is his time credited to sentence B? A. Yes, if he has any outstanding sentences that is to be served at the expiration of the cases that are set aside, he is given credit on those additional sentences.

Q. Mr. Dean—

The Court: That were not set aside?

Witness: Yes, sir.

The Court: All right.

Q. Now, Mr. Dean, in the case of Mr. Rice, on August 28, 1964, the date on which coram nobis was granted, were there any cases or any sentences that he—that your records show that he had on [25] that date? A. No, the records indicate that the sentences were set aside was all the sentences he had to serve with this Department.

Mr. Gish: That's all.

Redirect Examination by Mr. Lawson:

Q. Mr. Dean, is it my understanding that if the petitioner had had another sentence which was not set aside, which he had not been serving at the time he was erroneously convicted and was serving these particular sentences, that upon the first sentences being set aside, you would have credited the time that he had served upon the valid sentence which remained? A. That is correct.

Q. But if a person is convicted of four different crimes, and all of those cases are set aside because of errors committed by the State and he is retried, then the time which he has served and on those sentences, he receives absolutely no credit for? A. I don't—if that is all he has, and they are set aside, and he is carried back and resentenced, they are not—he does not receive any credit; there is no way we can give it to him.

Q. So the decision is made—it is something vague—that this time that he has served must have a valid sentence to connect to, to attach to? A. Well, I don't know as it's got to have that to connect to; all I am stating is that if a man has a sentence to serve, and the case [26] he is serving on is set aside, well, that time is credited to that sentence he has to serve; I don't know whether there is any attachment to each other or not.

Q. In other words, as in this case, a person really could spend more time in the penitentiary serving a sentence than is provided by the statute under which he was convicted? A. Well, I don't know that; I couldn't tell you that.

Q. In this instance, on the first case—in the first case he was tried on, he was sentenced to and was serving—he was sentenced to four years in prison, was he not; don't your records reflect that? A. That is correct.

Q. And he served two and a half years; is that correct; approximately? A. He served approximately that much.

Q. And he was resented on that case to ten years in prison? A. That is correct.

Q. On the same charge? A. That is correct.

Q. In other words, the State expects him to serve twelve and a half years for a crime where the statute only provides a maximum ten year sentence? A. Well, now, you are getting—we don't expect to see him serve—we don't make him serve anything except what the Court tells us to make him serve.

Mr. Gish: We object, Your Honor.

[27] The Court: I think I understand it; that is a matter of argument.

Mr. Gish: That's right.

The Court: What was the maximum sentence in 6427 on your statutes?

Mr. Melton: Ten years.

Mr. Gish: Ten years.

Mr. Lawson: They were all second-degree burglary.

Mr. Gish: They were all ten years.

Q. Mr. Dean, one last question; was Mr. Rice given any credit of any time—any kind for the two and a half years he served in prison before his resentencing? A. Not by this Department on his new sentences.

Mr. Lawson: That's all.

Mr. Gish: That's all.

WILLIAM S. RICE, Petitioner, having been duly sworn, testified as follows:

Direct Examination by Mr. Melton:

Q. This is William S. Rice? A. Yes, sir.

Q. Mr. Rice, you are the petitioner in this case? A. Yes, sir.

Q. And you are now incarcerated in Kilby Prison? [28]
A. Yes, sir.

Q. And have been there since when; how long have you been in Kilby Prison? A. Well, since February 16, '62.

Q. You originally convicted in the Circuit Court of Pike County? A. Yes, sir.

Q. And sentenced to Kilby Prison on February 16, 1962? A. Yes, sir.

Q. Now, have you been in Kilby Prison consistently since that time except for the time you were taken back to Pike County for your retrials? A. I have been in Kilby Prison all of that time with the exception of some time that I served in jail waiting on trial and after trial.

Q. That was down in Pike County? A. Yes, sir.

Q. In the County Jail of Pike County? A. I haven't been out of the penitentiary—I haven't been free since then.

Q. All right, sir. And you have either been in the Kilby Prison Penitentiary or the County Jail down in Pike County awaiting these retrials? A. Yes, sir.

Q. All right, sir; now, is it true, Mr. Rice, that you were originally convicted in these four cases in Pike County and given a total of ten years? [29] A. Yes, sir.

Q. Did you have a lawyer in those proceedings? A. No, sir.

Q. And while you were in Kilby Prison, and subsequent to the Gideon versus Wainwright and Escobedo decisions, did you file a writ of error coram nobis in the Circuit Court of Pike County to set aside those four original convictions? A. Yes, sir. I did.

Q. Was that writ granted by the Circuit Court of Pike County? A. Yes, sir.

The Court: Who was the Judge that sentenced you originally?

Witness: Mr. Eris F. Paul.

The Court: Judge Paul. Who was the Judge that set them aside?

Witness: Eris F. Paul.

The Court: And who was the Judge that resented you?

Witness: Honorable Eris F. Paul.

The Court: Same Judge?

Witness: Yes, sir.

Q. All right, sir; after Judge Paul set aside these convictions, Mr. Rice, had you—you—you said you had been in Kilby Prison all that time, hadn't you? A. Yes, sir.

Q. Had there been any additional evidence or new aggravating [30] circumstances or anything that was developed

between the time you were originally sentenced and the time you were retried and resented in these cases? A. In what direction?

Q. Well, had you done anything other than be in prison as a prisoner during that two-and-a-half-year period? A. No, sir.

The Court: Well, he had escaped.

A. Well, yeah; a couple of disciplinaries.

Q. Disciplinary actions for escaping— A. (Nodded to indicate affirmative reply.)

Q. —and then the gambling in the barracks there that he testified about? A. Well, they call it gambling; it was having some cards, which cards were contraband, but they —it hadn't been too contraband; in other words, just if they took a notion.

Q. All right; other than those two instances, though, Mr. Rice, had you done anything other than serve your time in the penitentiary between the time of your first convictions and your retrials and reconvictions? A. No, sir.

Q. All right, sir, I will ask you, now, if on the second trial, you had any conversations with any of the State officials on behalf of the State of Alabama as to the reasons why you received this increased—threefold increase in the punishment you had [31] originally received? A. No, sir.

Q. Did you have any conversation with the Sheriff about that? A. Well, the Sheriff of Pike County, I did.

Q. All right, sir; tell the Court what the Sheriff said? A. Well, he said that—that more than likely that—he explained it that Mr. Paul was probably mad because I came down there to get a new trial.

Mr. Gish: We move to exclude that.

The Court: I sustain it.

Q. Were you, Mr. Rice, the first petitioner to ever file a writ of error coram nobis in the Circuit Court of Pike County after these decisions by the Supreme Court of the United States? A. Are you talking about the Gideon—the Gideon case and Wain—

Q. Gideon and Wainwright, and Escobedo? A. Yes, sir I was the first one, I believe, because I—I didn't—

The Court: He was before Escobedo, wasn't he?

Mr. Melton: No, sir. As we understand it, Your Honor, Gideon was decided in March of '63 Escobedo was decided in June of '64; and Mr. Rice's writ was granted in August of '64.

Witness: Well, when the last case was decided, that is when I wrote the writ.

Q. That is when you wrote your writ? A. Error coram nobis.

Q. After the Escobedo decision came out? [32] A. Yes, sir.

Q. And then you do understand you were the first one to file such a writ in the Circuit Court of Pike County? A. As far as I know, I am.

Q. All right, sir. Now, do you know of any additional evidence that the State had access to on the second trial that was not available to the State on the first trial when you pled guilty? A. No, sir, and I don't know of any evidence at all, even before or after.

Q. As far as you know, it was the same evidence that you were convicted on? A. I was convicted on the same thing, you know.

Q. All right. Now, I will ask you, Mr. Rice, if you received a transcript of the evidence in the two cases that you were retried on and given ten years? A. Yes, sir.

Q. All right, sir; and did you appeal those to the Alabama Court of Appeals? A. Yes, sir.

Q. And were they affirmed by the Alabama Court of Appeals? A. They was affirmed.

Q. Is this the transcript of the evidence in the two cases where you were retried and given ten years, where you had originally gotten—well, a total of twenty years when you had originally gotten six years? [33] A. Yes, sir.

Mr. Melton: All right, sir. We would like to offer this transcript of the evidence in those two cases, Your Honor.

The Clerk: Petitioner's Exhibit number 2.

The Court: It will be admitted.

Q. When you were retried, Mr. Rice, on cases number 6427 and 6428, were those two cases in which you received the total punishment of twenty years—

The Court: Those are the two cases to which this transcript refers now?

Mr. Melton: Yes, sir.

Q. Were those two cases where you were sentenced to twenty years when you originally had six years, were they both tried in the afternoon of one day and the morning of the next day? A. Yes, sir.

Q. How long did the two trials take, the total time that the two trials took, in your best judgment and opinion? A. My best judgment, I don't think it took over thirty minutes for both trials, putting together, drawing the jury, putting them in the box, and them going to the anteroom

and coming back with a verdict of guilty. Now, it could be a minute or two less or a minute or two more.

Q. All right; but one was tried one afternoon and carried over until the next morning? A. The first case was held up awhile on that afternoon, because they [34] subpoenaed a witness out of Montgomery.

The Court: What difference does that make?

Mr. Melton: Well, we think, Your Honor, that it shows the entire atmosphere in which he was tried.

The Court: Did he have a lawyer on the second trial?

Witness: Mr. Bill Stokes, William Stokes.

Q. Mr. Stokes was appointed by the Court to represent you on the second trial? A. By the Court.

Q. But the two cases were tried there in an afternoon and a morning and before the same jury? A. Yes, sir.

Q. And then you were immediately resented to twenty years, in those two cases?

The Court: He is not attacking them on any—

A. I wouldn't say in front of the same jury, but in front of the same jury box.

Q. All right, sir. Now, I will ask you, Mr. Rice, after you were first sentenced to Kilby Prison in 1962, if this escape that they have punished you for or taken away your statutory good time and industrial good time took place about twenty days after you were first committed to Kilby Prison? A. Approximately.

Q. All right, sir. Now, other than that and the gambling that they took away two months of—of good time, have you had any other [35] misconduct since you have been in

Kilby Prison that would cause you to forfeit any statutory good time or industrial good time that the Alabama law would entitle you to? A. No, sir, I don't.

Q. All right, sir; now, did you receive this computation sheet here from the Classification Officer at Kilby Prison?

A. Yes, sir.

Q. Computing that statutory and industrial good time?

A. Yes, sir.

Q. And does that purport to be a true and correct copy of those computations that the prisoner is entitled to? A. On the inside of Kilby, that is what they figure it on right there, that is the inside figure and Kilby schedules.

Mr. Melton: All right, sir. We offer this as—

The Clerk: Petitioner's Exhibit number 3—wait, number 1.

Mr. Melton: —Petitioner's Exhibit number—

A. I imagine outside in the main office they do have a more modern or more decorated sheet or something another like that; I imagine they do.

Mr. Melton: All right, sir.

The Court: It will be admitted.

Q. Do you know of any reason, Mr. Rice, why your original sentences in these three cases which total eight years originally were increased to a total of twenty-five years on your retrial? [36] A. No, sir; I can't think of any reason they should be.

Q. Do you know of any reason why the State has not given you credit for the two and a half years you served on those previous erroneous sentences?

Mr. Gish: We object to that.

A. No, sir; I don't.

Mr. Gish: As a matter of law, I think that is—

The Court: After all, they may have some reason for not doing it, and he may know, I don't know.

Mr. Gish: All right, sir.

Q. What was your answer, Mr. Rice? A. I don't know of any reasons at all.

Q. Based on the chart that you have just introduced in evidence, have you computed the length of time you would have had to serve on an eight-year sentence? A. Yes, sir; definitely.

Q. How much time would you have to serve on an eight-year sentence? A. Five years, two months, and six days.

Q. All right, sir; and from February of 1962 to the present time, would you have served more than that, total time? A. I would say I served about five months over that.

Q. Five months more than that maximum time on an eight-year sentence? A. Yes, sir.

Q. Do you have anything else, Mr. Rice, you want to state to the Court or any other statement you would like to make at this time? [37] A. Well, not unless its—not having any harsh thinkings or anything by saying it, but I just don't see where—where—where it is quite right to get that much time for going back for a retrial, I don't—I don't understand that.

Q. And the only legal act you had committed in that interval was the filing of this petition for writ of error coram nobis? A. That is the onliest thing I did, and I did it with—within the rules of Kilby.

Mr. Melton: All right, sir. That's all.

Cross Examination by Mr. Gish:

Q. Mr. Rice, when you first went to Court on February 16, 1962, you plead guilty, did you not? A. Yes, sir.

Q. And you—did you plead guilty to four cases? A. Yes, sir.

Q. All right. How much time was given you in those four cases? A. Ten years.

Q. Ten years? A. (Nodded to indicate affirmative reply.)

Q. Then the computation that you made of eight years—
A. Sir?

Q. The computation you made in regard to eight years left out two years that you originally got is that correct?

A. Well, when I went back and got this new trial, they nol-prossed [38] the sentence which had taken care of two years—

Q. That is correct. A. —which left eight years.

Q. That is correct; they nol-prossed one of your two-year sentences after that sentence had been set aside on coram nobis is that correct? A. No; I don't believe I understand you.

Q. When you filed your petition for writ of error coram nobis, was it in all four cases? A. Yes, sir.

Q. Was the petition granted in all four cases? A. Yes, sir.

Q. And when it was granted, you—they declared all those sentences void; is that correct? A. That's right.

Q. All right. Then you were retried the first time on December 3, 1964, is that correct? A. That's right.

Q. How many cases were tried at that time? A. Two.

Q. Two cases. And how many witnesses were examined?
A. In the first case, they examined about, oh, three or four, the second case, they examined one.

Q. Did you testify? A. No, sir, I didn't.

[39] Q. You didn't testify in either case. You were—did you have a Court-appointed attorney or— A. Sir?

Q. You had an attorney, did you not? A. Well, I was—I was asked by Mr. Stokes to not take the stand.

Q. Was Mr. Stokes your attorney? A. Yes, sir.

Q. Was he appointed by the Court, or did you hire him? A. No, he was appointed.

Q. He was appointed— A. Yes, sir.

Q. —as your attorney? And on—if I understand you correctly, on his advice, you did not take the stand; is that correct? A. Yes, sir, that's right.

Q. Did you discuss with him prior to the trial whether you should plead not guilty; did he advise you how to plead? A. I didn't see Mr. Stokes until like this afternoon of the 2nd or maybe it might have been the 1st—the trial started on the 3rd, I believe, but anyway, the day before the trial started, that afternoon he came by and said, "They are going to try you tomorrow."

Q. All right. A. And he says—

Q. That—at that time, did you talk with him about whether or not to plead guilty or not guilty? [40] A. Not at that time.

Q. Did he ask you questions concerning the facts of these cases, did you discuss it with him? A. I subpoenaed some witnesses, he said we had—didn't have time, because they was going to try the case the next day, said they might try it late that afternoon, but said if they didn't try it late that afternoon, they would try it the next day.

Q. Did you, yourself, personally subpoena those witnesses? A. No, sir; I never did get to subpoena—

Q. Who subpoenaed the witnesses? A. Who did I subpoena?

Q. No; who subpoenaed them? A. I didn't have any; I didn't—I never did get any subpoenaed.

Q. I misunderstood you. Now, let's go back to your first trials, your first pleas of guilty. As I understand it, you got four years in one case and two years in each of three other cases— A. Yes, sir.

Q. —is that correct? A. (Nodded to indicate affirmative reply.)

Q. Now, prior to the time that you entered those pleas of guilty, you did not have an attorney, right? A. No, sir.

Q. All right. Tell me, did you discuss with the D.A.'s office or any other officers the amount of time you would get— A. I did.

[41] Q. —on pleas of guilty? A. Yes, sir; I—I definitely did.

Q. Who did you discuss it with? A. With—I tried to think of that Solicitor's name the other day when I was talking to you, and I couldn't think of his name.

Q. Was his name— A. Not Mr. Stephens.

Q. Was his name Mr. Lewey Stephens? A. No, sir. But he—he told me if I would go up there and plead guilty, that—that he would get me a five-year sentence and not over seven years.

Q. All right, sir; the man you talked with said you would not get over seven years? A. And he told—

Q. Is that right?

Mr. Melton: Was it Mr. Kenneth Fuller?

Witness: Mr. Kenneth Fuller; that is him.

Mr. Melton: He was the Solicitor at that time—

Witness: Yes, sir.

Mr. Melton: —and Mr. Stephens succeeded him.

Witness: Fuller, he is the man told me that.

Mr. Gish: All right, sir.

Witness: I know the man well, but I just couldn't think of his name.

Mr. Gish: Thank you, Oakley.

[42] (*By Mr. Gish*):

Q. Mr. Fuller; you say he told you that you would not get over seven years; is that correct? A. He said—at first he says I would get five, not over seven, and then he kind of laughed and says, "If you get seven, I will do two of them, myself."

Q. And he actually—actually you got ten— A. Yes, sir.

Q. —is that correct? A. (Nodded to indicate affirmative reply.)

Q. After you were arrested after these burglaries were committed, were you on bond? A. No, sir.

Q. You were in jail from the time of your arrest? A. (Nodded to indicate affirmative reply.)

Q. And you did not hire an attorney—attorney, and none was appointed? A. No, sir.

Mr. Gish: I believe that's all.

Re-Direct Examination by Mr. Melton:

Q. Did you have any money to make bond or to hire an attorney? A. I did until they confiscated it and taken it away from me.

Q. Is that at the original arrest? A. The original arrest.

Q. I see. Did you have any money to make bond on the—after the [43] original convictions were set aside— A. No, sir.

Q. —and while you were awaiting retrial on the cases to be retried? A. No, sir.

Mr. Melton: That's all.

Mr. Gish: That's all.

Mr. Melton: That's all.

The Court: As a matter of interest, Rice, let me ask you; who prepared this petition for you that you filed in this Court?

Witness: A friend of mine in Kilby helped me; me and him together; his name is Heflin, Mr. Heflin.

The Court: Who?

Witness: Heflin.

The Court: What is his first name?

Witness: Your Honor, I hate to say it, but, you know, out there we don't get too well acquainted with one another; you know a guy four or five years, and you wouldn't get too well acquainted. We call him Foot—Foots Heflin, that is all I can say, and I talk to him every day and—

The Court: Who typed it out for you?

Witness: He typed some of it, and I got some of it typed at other places.

The Court: Where?

Witness: Well, I got someone on the fifth floor to type some, and I typed some at the cotton mill.

[44] The Court: Uh, huh; who typed the brief for you on the law?

Witness: You mean like the allegations and stuff?

The Court: No, your brief—yes; you call it allegations here; yes?

Witness: Different ones; myself and him, and, you see, they got a little law library there in the library—

The Court: Yes.

Witness: —and you go in there and check a book out, and you can sit there and read it as long as you

want to, and whenever you get through with it, you check it back in, and sometimes in exceptional cases they will let you take a book to the cell with you at night, and then you can sit up and read—

The Court: Who wrote your brief for you?

Witness: Well, I would say no certain one; two or three of us.

The Court: Who were they?

Witness: Well, me and Hefin and guy called Franklin.

The Court: Who?

Witness: Franklin; I believe he helped write some of it.

The Court: Who else?

Witness: That is about it.

The Court: I just wondered; it is a very good, very good brief.

[45] Witness: Yes, sir.

The Court: I just wondered who your lawyer was out there. Which one of them would you say was your lawyer?

Witness: Well, I wouldn't say that any of them was my lawyer; in other words, just like I say, it was just all put together and bunched in and did, and like I have guys come to my cell, or fellows, rather, and they ask me about a certain law; if I know it, I tell them; and I go by their cell, and I will ask them about a certain law; and if they know it, they will tell me.

The Court: Yes.

Witness: And if we—neither one of us knows it, we go by the coffee shop and get a cup of coffee, and then go down to the library and get the book, and look it up, and then read it until we understand it.

The Court: Is it easier for you to file these petitions now than it used to be?

Witness: Well, yes, sir; for when they first started filing petitions, they would put them in the dog house and lock them up, and any way to keep them from getting the stuff to file them with, or any way to file them, and then there was some boys, you know, they wrote their people and did this. I think some part of the Federal came out there, Government, and told them to go ahead and let them file them, that that was their rights or something another like that. And now you can go—you can go to the front office and tell them how many sheets of paper you want, they will give [46] it to you.

The Court: To file your petition with?

Witness: Yes, sir; to file the petition with.

The Court: Do you have a typewriter?

Witness: Well, there are a few typewriters in the cell block. Here in the past three or four months, they taken them up; they taken up most of them that was personally owned, you know.

The Court: It is easier to file one in Federal Court than it is in the State Court; it is easier to file a habeas corpus in a Federal than it is a coram nobis in the State?

Witness: Judge, Your Honor, I just couldn't answer that, for I—either way I answer it, I could be wrong, so I won't—I won't go into it. I never had too much trouble. I know—of course, I haven't done too much filing. I did go to Supreme Court, and for some reason another I didn't go like I should go, so they denied me on jurisdiction. So—

The Court: Has there been any new rule as far as you know in the last few months about it is all right

to go ahead and file any of these habeas corpus you have in the Federal Court if you want to?

Witness: On; yes, sir. Here in Atlanta, not too long ago, about six or eight weeks ago, maybe a little longer, they had a fellow over there that they referred to as a lawyer within the walls, and they questioned some guys about it, and they called him out and questioned him, and he told them, he says, "Well, I don't [47] charge anybody for anything"; he says, "Anything I do," he says, "I do it just trying to help somebody," and he says, "No way I would accept a nickel for it." So it went from there. It was nothing done about it, so—and I have—

The Court: You say that was where?

Witness: In Atlanta Federal, Federal Penitentiary.

The Court: I am talking about out here at Kirby; has there been any new rule that gave you the green light on filing these habeas corpus petitions in the last few months?

Witness: No, sir; no more than what you would read and study in those books.

The Court: What I am asking you, has it become easier for you to file them recently than it was in the past?

Witness: Oh; yes, sir; yes, sir; definitely; yes, sir.

The Court: When did it get easier?

Witness: Oh, I would say for the past two or three years, why, you just go out there and tell them how much paper you want and something another like this and go ahead and write your writ and file it.

The Court: That is all I want to ask him.

Witness: Yes, sir.

By Mr. Melton:

Q. Mr. Rice, in your case, did you file your petition in your case after you read a newspaper article on the decision in Patton versus North Carolina? A. Yes, sir; this here is what got me started going to the library [48] and inquiring and picking up a little odds and ends and little allegations here and there.

The Court: How much education do you have, Mr. Rice?

Witness: Sir?

The Court: How much education do you have?

Witness: I have eighth grade.

The Court: All right. I was just trying to find out who wrote his petition; he didn't write it.

Witness: No, sir; I didn't write the petition.

The Court: He didn't write it; I was just trying to find out who wrote it.

Witness: Heflin is the one that actually, Your Honor, worked with me on writing it.

Q. But after you read this newspaper article, then you started getting help and writing your petition? A. (Nodded to indicate affirmative reply.)

The Court: I have a real reason for asking; I am being flooded with these. I have had over two hundred in the last year from Kilby, and the State Court evidently has stopped having hearings on coram nobises and just letting them lie, and the petitioners are alleging that they can't get any action in State Court, and for all practical purposes, they have exhausted their remedies. I was trying to find out what is at the bottom of it.

Witness: (Nodded to indicate affirmative reply.)

Mr. Melton: We introduce this newspaper article.

[49] The Clerk: Petitioner's Exhibit number 3.

Q. Do you understand, Mr. Rice, that in the Aaron case the Alabama Courts have refused to pass on the question of whether a prisoner is entitled to any credit for prior time served?

Mr. Gish: We object, Your Honor.

The Court: I sustain it.

Mr. Melton: All right, sir. That's all; you can come down.

The Court: Do you have anything else?

Mr. Gish: No, sir.

The Court: Other than this computation that Mr. Dean is going to make—and I take it he will just mail it in?

Mr. Melton: Yes, sir.

The Court: Do you have anything else to offer?

Mr. Melton: Let me just—

(Mr. Melton had conference with petitioner at counsel table.)

The Clerk: Was this admitted?

The Court: It is not worth anything. Do you have any objection to this newspaper article?

Mr. Gish: No, sir; I do not.

Mr. Melton: We rest, Your Honor.

Mr. Gish: Warden rests.

The Court: You want to file any other law with me on it?

[15] Mr. Gish: No, sir; I believe I have done the best I could in the brief already filed.

The Court: All right. Do you have any other authorities you want to file?

Mr. Melton: Yes, sir; Your Honor. We would call the Court's attention to the annotation in 12 A.L.R. 3rd 978, particularly with the cases starting on page 983, which indicate that the States of Arkansas, California, and New Jersey, as well as the First Circuit in Marano and Fourth Circuit in Patton, have all clearly held that you cannot increase the punishment on a retrial for any reason. And then, of course, this Court—

The Court: What are the Circuits where they say you can't do it where no reason is given?

Mr. Melton: The First Circuit in Marano and the Fourth Circuit in Patton.

The Court: That is where they attempted to justify it, and they say you can't even justify doing it.

Mr. Melton: That's right, sir.

The Court: What are the—what are the jurisdictions that say you can't do it where you do not attempt to justify it?

Mr. Melton: Seventh Circuit in U.S. versus White, Your Honor, apparently holds you can increase the punishment without any reason, that you don't have to justify it under any circumstances. And then the Third Circuit in Starner versus Russell is just completely contrary to Patton and Marano in First and Fourth Circuits, [51] but it appears to us you have a—and we find no Fifth Circuit case right on it; it appears to us you have a direct conflict between the First and Fourth and the Third and Seventh Circuits, and we think the reasoning in Patton and Marano is completely applicable to this case, and

should not be increased, that no evidence of any change in circumstances.

The Court: Yes; well, I am not impressed with his contention—and I take it he is making that—that he is entitled to carry over any good time; that is an administrative matter, and no evidence here to show any abuse at all. I have expressed myself in Hill against Holman, whether or not he is entitled to, in a sentence subsequently imposed, to be given credit on the time he has served on an illegal sentence, but that didn't have anything to do with the granting or the deprivation of statutory or industrial good time.

Mr. Lawson: Your Honor, in that case, you did cite—

The Court: Yes, I know; I cited that Hoffman case and that other case.

Mr. Lawson: Youst case dealt with the good conduct, and it has been cited, also, in Short versus United States, a recent case which grants—

The Court: He served on the first sentence, 6427, from February 16, '62, to August 28, '64.

Mr. Melton: Approximately two and a half years, Your Honor.

[52] The Court: Yes; and I take it he didn't accumulate much, if any, good time. Mr. Dean is going to compute that for me.

Mr. Melton: Yes, sir; but we—we take issue with Mr. Dean when he says that—when he escaped within twenty days after he was admitted—

The Court: Yes.

Mr. Melton: —that that can be related in the future; the only—the only—

The Court: What is wrong with doing that?

Mr. Melton: The only—the statute prohibits it; just—the only thing the statute does, when you have a violation, you forfeit any good time you may have previously accumulated; you can't—

The Court: Is it restricted to having previously accumulated?

Mr. Melton: Yes, sir; it is a forfeit. The statute uses the word, "Forfeit," as I recall it.

Mr. Gish: Your Honor, if I may, you could—you can forfeit in the future as well as forfeit retroactively.

The Court: Of course; I am not impressed with that. I don't see any objection at all to—to forfeiture in the future of time for—for attempted escape or for escape or something; there have to be some disciplinary rules and some punishment—

Mr. Melton: Yes, sir.

The Court: —even in the penitentiary.

[53] Mr. Lawson: Your Honor, I think what we are getting to is basically that we feel that the sentence should be considered by the Court as having started when he was first sentenced and run for eight years, with all good time deductions and industrial time deductions figured for that period of time. Now, we were unsure before we came to Court exactly what he would be entitled to the way of these good time deductions, whether taking those into account he would be entitled to immediate release or not.

The Court: Well—

Mr. Lawson: I think either way—

The Court: —we must assume for this computation that Mr. Dean is going to do for the Court that they were entitled to—and I am going to assume that

—forfeit good time to be earned in the future when he escaped the first month he was in the penitentiary.

Mr. Melton: Well, when he does that, Your Honor—

The Court: I don't read that statute as barring their doing that.

Mr. Melton: The language is, "Such extra good time allowances may be forfeited for misconduct in the same manner as deductions for good conduct."

The Court: Yes.

Mr. Melton: So we say you can't forfeit something you haven't earned.

The Court: Well, the Army has been forfeiting pay and allowances for six months in the future for many years.

[54] Mr. Melton: But regardless of that, Your Honor, we think the basic question is whether they could increase—

The Court: That just comes to mind.

Mr. Melton: Yes, sir. Perhaps there is a difference in a claim for money and a man's liberty.

The Court: Yes; I used to prosecute and defend some when I was in the Army. On a sentence you forfeit pay and allowances for six months to come, you don't forfeit what you have already made. I don't see a thing wrong with forfeiting good time to be earned in the future administratively, I don't see anything in that statute that bars it. I don't want to get concerned too much with that.

Mr. Melton: Yes, sir.

The Court: I do want to get concerned with how much time he has served on that previous sentence and then, of course, there is no way to keep from

being concerned, under the issues in the case, with the imposition of more severe sentence upon going back before the Court.

Mr. Lawson: Your Honor, you mentioned some of the cases that—that take a kind of in between view and hold that the sentence—greater sentence can be imposed if it is explained.

The Court: I tried to focus Mr. Melton's attention to those—those sentences.

Mr. Lawson: I think at least maybe the Short case—I am not certain right now, we cited it for another proposition—but it may be the one that holds that way, but I would—and also, [55] the Patton case, the lower Court, District Court, wrote directly on that. And the language of the District Court that I think does express these views says that while it can be justified, the burden is on the State to prove the justification of the sentence.

The Court: Yes, while we are on that, you might send me a letter memorandum on the practice of imposing larger sentences where defendants go to trial than where they plead guilty. The Fifth Circuit has addressed itself to that point.

Mr. Gish: Yes, sir, yes, sir; one—

The Court: Says you can't do it.

Mr. Gish: One Fifth Circuit case—

The Court: You can't do it; you can't penalize a man for exercising his constitutional right to require the State to prove his guilt.

Mr. Gish: Your Honor, may I say one thing here in connection with one of these points? In the Hill against Holman case, Your Honor's order is—is broad enough to release this man if his time is up;

however; in that Hill case, Mr. Hill had served enough time to serve his sentences except for the year and a day he got on—on his last sentence, if you will remember, and his petition was not filed until after he had served the last year and a day. Our contention in that respect is that on its facts, the Hill case goes no further than the Youst case on its facts; that follows the Youst case. Now, I think there is, sir, a valid argument here that when sentences are declared void, they are void sentences; [56] they cannot be served as if—if time was served in the penitentiary, there must be something valid upon which to attach that time. In this—

The Court: Well, they were—the indictments were not set aside. The indictments were not set aside.

Mr. Gish: No, sir—

The Court: The cases, the criminal cases, were still pending against him, and the State of Alabama was still prosecuting him, and they did re prosecute him, and they resentenced him. Why can't they attach to those?

Mr. Gish: Why can't they attach—

The Court: They are not new cases; they are the same cases that the State made the mistake in and sent him to the penitentiary for two and a half years.

Mr. Gish: Your Honor, my—my position is—is that he was not sent to the penitentiary under any valid sentence until these last cases were tried. Now, I am not saying that he hasn't been wronged. He—I think that—the time served under a void sentence, with no credit for it in any way, there may be a wrong there, but I am wondering what the remedy for the wrong is. Is this—

The Court: Where you resentence him in the same case—where you resentence him in the same case, isn't it very simple to conclude that the remedy should come in reduction of the sentence to the extent that he has been required to serve an illegal sentence in that same case?

[57] Mr. Gish: Suppose, Your Honor, that on a plea of not guilty, he was acquitted?

The Court: Then I would suggest, if I were representing him, that maybe he go before the State Board of Adjustment.

Mr. Gish: All right; all right, sir. I was just trying to make the point—

The Court: Or get him a member of the Legislature to represent him before the State Board.

Mr. Gish: I was just trying to make the point, Your Honor, that if there is a wrong here, and—if a wrong here, that should the remedy be any different for the man subsequently convicted than it is for a man subsequently acquitted. Should not—

The Court: Yes.

Mr. Gish: Should not the remedy be the same?

The Court: There is no—there is no remedy available where he is subsequently acquitted, because there is no case there in which he has been illegally punished by incarceration in which to afford the remedy; the case is wiped out. On a subsequent conviction, the case in which he has been illegally punished is still there, and he is still being illegally punished without having been given credit.

Mr. Gish: Of course, I see that argument; I just merely say this other point that I brought forth

does have some substance. The Tenth Circuit in Newman against Rodriguez so held.

The Court: Thank you, gentlemen.

[58] Mr. Gish: Thank you, sir.

The Court: Recess until further order.

Opinion of the United States Court of Appeals

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 25412

**GURTIS M. SIMPSON, Warden,
Kilby Prison, Montgomery, Alabama,**

Appellant,

versus

WILLIAM S. RICE,

Appellee.

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA.**

(May 30, 1968.)

Before TUTTLE and DYER, Circuit Judges, and MEHR-
TENS, District Judge.

TUTTLE, Circuit Judge: William S. Rice in February, 1962, entered pleas of guilty in four separate criminal cases in the Circuit Court of Pike County, Alabama. He was sentenced to a total of ten years in the state penitentiary, the term consisting of four separate sentences, the first for four years and the remaining three for two years each. In August, 1964, the judgments and sentences in these cases were set aside by the Circuit Court of Pike County in a

coram nobis proceeding on the ground that appellee was not represented by counsel at the time of his original pleas.

The petition for habeas corpus to the District Court alleged that the appellee was retried in three of the four cases at which time the same trial court sentenced him to a total of twenty-five years, the term consisting of a sentence of ten years on each of the first two charges and five years on the third. The fourth charge was dismissed because of the absence of a witness. Rice attacked these subsequent sentences to the extent that they exceeded the original sentences on the original pleas of guilty and to the extent that they did not also give him credit for the time served under the vacated sentences.

The trial court overruled the State's motion to dismiss the petition for failure to exhaust state remedies, there being at the time of the hearing no adequate state procedure which the appellee was required to pursue. Although an intervening decision by the Court of Appeals of Alabama, *Goolsby v. State*, Sixth Division 202 (not reported) might have some bearing on the merits of this case, under the principles of *Fay v. Noia*, 372 U. S. 391, we should not remand the case to require the appellee to pursue a state remedy at this stage of the proceedings.

The District Court entered a judgment granting the relief sought by the appellee. It would be useless for us to add to the reasoning or conclusions announced by the trial court whose opinion may be found at 271 F. Supp. 267. We, therefore, affirm the judgment of the trial court on the basis of Judge Johnson's opinion which is adopted as the opinion of this court.

The judgment is **AFFIRMED**.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1967

No. 25412

D. C. Docket No. CA 2583-N

**CURTIS M. SIMPSON, Warden,
Kilby Prison, Montgomery, Alabama,**

Appellant,

versus

WILLIAM S. RICE,

Appellee.

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA**

**Before TUTTLE and DYER, Circuit Judges and MEHR-
TENS, District Judge.**

**This cause came on to be heard on the transcript of the
record from the United States District Court for the Middle
District of Alabama, and was argued by counsel;**

**ON CONSIDERATION WHEREOF, It is now here ordered and
adjudged by this Court that the judgment of the said Dis-
trict Court in this cause be, and the same is hereby, affirmed.**

It is further ordered and adjudged that the appellant, Curtis M. Simpson, Warden, Kilby Prison, Montgomery, Alabama, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

May 30, 1968

Issued as Mandate: June 21, 1968

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**IN THE
Supreme Court of the United States**

October Term, 1968

CLIFTON A. PEARCE,

Respondent

v.

**STATE OF NORTH CAROLINA,
WARDEN R. L. TURNER,**

Petitioners.

**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT.**

**TO: THE HONORABLE CHIEF JUSTICE AND ASSOCI-
ATE JUSTICES OF THE SUPREME COURT OF THE
UNITED STATES:**

Your petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in the case of **CLIFTON A. PEARCE v. STATE OF NORTH CAROLINA, WARDEN R. L. TURNER** entered on June 19, 1968.

CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported as **CLIFTON A. PEARCE v. STATE OF NORTH CAROLINA, WARDEN R. L. TURNER**, _____ F.2d _____ (4 Cir. 1968) and is printed as Appendix D to this petition.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S. Code, Section 1254(1).

QUESTION PRESENTED

MAY A DEFENDANT BE SENTENCED TO A LONGER TERM OF IMPRISONMENT AT A SECOND TRIAL THAN HE RECEIVED AT HIS FIRST TRIAL AFTER THE FIRST TRIAL HAD BEEN VACATED ON THE GROUND THAT DEFENDANT'S CONFESSION HAD BEEN ERRONEOUSLY ADMITTED?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides as follows:

Section 1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Fifth Amendment to the Constitution of the United States provides as follows:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation."

STATEMENT OF THE CASE

Clifton A. Pearce was initially tried at the May 1961 Term of the Superior Court of Durham County, North Carolina, on a charge of rape. Upon arraignment the prosecuting attorney elected to try Pearce for the offense of assault with intent to commit rape. A verdict of guilty of assault with intent to commit rape was returned by the jury. Pearce was sentenced to a term of imprisonment of not less than twelve nor more than fifteen years.

In 1965 Pearce applied for and obtained a Post Conviction review and on May 10, 1965, W. J. Johnson, Judge Presiding at the May 1965 Criminal Session of Durham Superior Court, entered an Order denying relief. The Supreme Court of North Carolina granted Certiorari to review Judge Johnson's Order and awarded Pearce a new trial "upon the ground that the trial court committed error in admitting, over defendant's objection, (his) confession . . .". This case is reported in 266 N. C. 234, 145 S.E. 2d 918 (1966).

A new Bill of Indictment charging assault with intent to commit rape was returned against Pearce by the Grand Jury at the March 1966 Session of the Durham Superior Court. Pearce was tried at the June 6, 1966 Two-Week Criminal Conflict Session, Durham Superior Court. The jury returned a verdict of guilty as charged and a prison sentence of eight years was imposed. Pearce appealed to the Supreme Court of North Carolina which affirmed the conviction. 268 N.C. 707, 151 S.E. 2d 571 (1966).

In March 1967, Pearce applied to the United States District Court for the Eastern District of North Carolina for a Writ of Habeas Corpus. In July 1967 Pearce filed a "Motion to Amend Petition for Writ of Habeas Corpus". On November 20, 1967, the District Court entered an Order voiding Pearce's second sentence under the decision of *PATTON v. STATE OF NORTH CAROLINA*, 381 F. 2d 636 (4 Cir. 1967), cert. den. 390 U.S. 905 (1967). The Order further directed that the State of North Carolina "proceed to re-sentence said Clifton

A. Pearce within sixty days from the date of service of this Order" and if the State of North Carolina does not elect, "this Court will entertain a motion on behalf of the petitioner for an order releasing him from all restraint imposed by virtue of the sentence of eight years imprisonment imposed at the June 1966 Session of the Superior Court of Durham County upon his conviction of assault with intent to commit rape." (See Appendix A).

On November 30, 1967, James H. Pou Bailey, a Judge of the Superior Court of North Carolina and Judge Presiding at the November 1967 Term of the Superior Court of Durham County, entered an Order electing not to re-sentence Pearce. (Appendix B).

On February 1, 1968, the United States District Court for the Eastern District of North Carolina entered a Writ of Habeas Corpus ordering Pearce's immediate release "from all restraint imposed by virtue of the sentence of eight years imprisonment imposed at the June 1966 Session of the Superior Court of Durham County, North Carolina, upon his conviction of assault with intent to commit rape." (Appendix C).

The State of North Carolina and Warden R. L. Turner appealed the District Court's decision to the Fourth Circuit Court of Appeals. The Circuit Court, in a Memorandum Decision based upon *PATTON v. STATE OF NORTH CAROLINA*, 381 F. 2d 636 (4 Cir. 1967), affirmed the District Court's ruling and is quoted in its entirety in Appendix D. The opinion by the Fourth Circuit was filed on June 19, 1968.

REASONS FOR GRANTING THE WRIT

(1) The decision of the United States Court of Appeals for the Fourth Circuit in this case is in conflict with decisions by the North Carolina Supreme Court on the question of whether or not a defendant may be given a longer sentence at a second trial than he received at the first trial which had been set aside.

(2) The decision of the United States Court of Appeals for the Fourth Circuit in this case is in conflict with decisions rendered by other circuits on this same question.

The Fourth Circuit Court of Appeals held in this case that under no circumstances could a longer sentence be imposed at the second trial than was imposed at the first trial, and that to do so would be a violation of the due process and equal protection clauses of the Fourteenth Amendment and of the double jeopardy provision of the Fifth Amendment. This decision of the Fourth Circuit is in conflict with the decisions rendered by the Supreme Court of North Carolina in the following cases: *STATE v. WHITE*, 262 N.C. 52, 136 S.E. 2d 205 (1964); *STATE v. ANDERSON*, 262 N.C. 491, 137 S.E. 2d 823 (1964); *STATE v. SLADE*, 264 N.C. 70, 140 S.E. 2d 723 (1965); *STATE v. WEAVER*, 264 N.C. 691, 142 S.E. 2d 633 (1965); *STATE v. PEARCE*, 268 N.C. 707, 151 S.E. 2d 571 (1966); *STATE v. PAIGE*, 272 N.C. 425, 158 S.E. 2d 522 (1967).

The position of the North Carolina Supreme Court is set forth in the case of *STATE v. WHITE*, 262 N.C. 52, 136 S.E. 2d 205 (1964). The Court, in that decision, noted: "The defendant at his request was granted a new trial of his case tried at the May 1961 Criminal Term in which he was found guilty as charged in the indictment, which under our decisions results in a retrial of the whole case, verdict, judgment, and sentence. (Citations omitted)." The North Carolina Supreme Court then went on to determine: "There is nothing in the record to suggest that (the trial judge) imposed upon defendant, a heavier sentence than he received at the first trial merely because he obtained a new trial. When defendant, at his request, obtained a new trial, hoping to be set free or obtain a lighter sentence, he accepted the hazard of receiving a heavier sentence, if convicted at the new trial of the same identical offense, and this is not a denial to him of any constitutional right as contended by him."

In *STATE v. PAIGE*, *supra*, the North Carolina Supreme Court again held that a longer sentence could be imposed

at a retrial than had been imposed at the first trial. This opinion was handed down after the Circuit Court's opinion in *PATTON v. NORTH CAROLINA* was decided.

The Maryland Court of Special Appeals has already declined to follow the Fourth Circuit Court of Appeals decision in the Patton case in two very recent decisions, *MOON v. STATE*, 232 A. 2d 277 (1967), and *REEVES v. STATE*, 238 A. 2d 307 (1968), stating that it adhered to the former Maryland decisions on this question. The State of Maryland is within the jurisdiction of the Fourth Circuit Court of Appeals.

The various circuits are also in disagreement as to whether or not a longer sentence may be imposed at the second trial.

In *MARANO v. UNITED STATES*, 374 F. 2d 583 (1st Cir. 1967), defendant Marano had received a sentence of three years at his first trial after being convicted in the U. S. District Court of receiving stolen goods transported in interstate commerce. Upon appeal, his conviction was set aside and a new trial granted. At his second trial he was again convicted of the same offense and received a five year sentence. The same judge who had presided at Marano's first trial also presided at his second trial. The Court, in imposing the five year sentence, expressly disclaimed that it was penalizing the defendant, and gave two reasons for increasing the sentence: "Mr. Marano's sentence was based on evaluation of the presentence report and the additional testimony which came out at the trial."

It was held by the First Circuit Court of Appeals in *MARANO* that a sentence may not be increased following a successful appeal, even where additional evidence has been introduced at the second trial. It recognized an exception with respect to presentence reports, stating that "we do not think it inappropriate for the court to take subsequent events into consideration, both good and bad." 374 F. 2d at 585. The Court in that case also stated that if a sentence was increased following retrial the "grounds for doing so should be made affirmatively to appear." *Id.* at 585-86, N. 3.

In determining that defendant Marano's second sentence of five years was improper, the First Circuit stated: "As we have recently held, a defendant's right of appeal must be unfettered. *WORCHESTER v. COMMISSIONER OF INTERNAL REVENUE*, 1 Cir. 1966, 370 F. 2d 713. So far as sentence is concerned, this principle cannot be restricted to those situations in which a defendant, in deciding whether to appeal, must contemplate the certainty of an increased sentence if he obtains a new trial and is convicted again. Not only must he not be faced with such a certainty, *WORCHESTER v. INTERNAL REVENUE*, *supra*, he likewise should not have to fear even the possibility that his exercise of his right to appeal will result in the imposition of a direct penalty for so doing." 374 F. 2d 585. The First Circuit cited the District Court opinion in the *PATTON* Case in support of this statement.

In *STARNER v. RUSSELL*, 378 F. 2d 808 (3rd Cir.) cert. denied, 389 U.S. 889 (1967), the Third Circuit Court of Appeals stated the question to be determined in that case as follows: "The sole issue in this case is the right of a State Court to increase punishment following a new trial where the first sentence imposed on the prisoner's plea of guilty is less and vacated on the prisoner's contention that he was denied counsel as required by *GIDEON v. WAINWRIGHT*, 372 U.S. 335, 83 S. Ct. 792, L. Ed. 2d 799." 378 F. 2d at 810.

In this case, the United States District Court had held the second sentence to be unconstitutional because of the insufficiency of the sentencing court's reasons for imposing a greater sentence on the basis of the opinion in the case of *PATTON v. STATE OF NORTH CAROLINA*, 256 F. Supp. 225 (W.D.N.C. 1966). The Third Circuit Court of Appeals held this to be error.

In *STARNER* the Third Circuit Court of Appeals specifically disagreed with that portion of the opinion of the First Circuit Court of Appeals in *MARANO v. UNITED STATES* which is quoted above and in support of which the District Court case of *PATTON v. NORTH CAROLINA* was

cited. The Third Circuit stated, at page 811: "We differ with the Court's opinion for the reason that we cannot properly speculate that the court certainly will increase the sentence, after a new trial. To so hold would seem to trespass the integrity of the trial judge who, upon hearing all of the evidence, with the whole panorama of defendant's crime laid out before him, conscientiously passes sentence in accordance therewith, even though here the defendant did not take the stand nor call witnesses on his behalf. The sentence thus imposed by the trial judge cannot, in any sense, be said to be for his appealing, unless we again attribute to him a base motive—penalizing him for his appeal, conduct unworthy of the name of judge—rather than for his weighing and evaluating the measure of defendant's crime and passing sentence thereon, in the light of the wider, factual area encompassed by the trial which, in most instances, is far more revealing than those factual elements taken into consideration in the imposition of sentence upon a plea of guilty . . . When he appeared and entered a plea of not guilty at the second trial, the slate had been wiped clean and it was an entirely new case and bore no relationship whatsoever to his previous plea of guilty which he had entered."

Another reason given by the Third Circuit Court of Appeals in upholding the longer sentence given at the second trial in the STARNER Case would also apply to Patton's situation, upon which Pearce is bottomed. At his first trial, Patton entered a plea of nolo contendere. At his second trial, Patton entered a plea of not guilty and was found by a jury to be guilty as charged. Starnier had entered a plea of guilty at his first trial, and at his second trial had entered a plea of not guilty and was found by a jury to be guilty as charged. The Third Circuit stated at 378 F. 2d 811: "Furthermore, there is much to be said for the Commonwealth's position that on a plea of guilty the defendant has already entered on the rehabilitative process, that he is purging himself thereby on his wrong doing, and it must be conceded that a sense of contrition therefore must have motivated his conduct and, accordingly, consideration might well be given therefor. However, when he elects to have his case retried before a jury, he takes a chance after conviction on the trial judge's

discretion in sentencing him. In *ROBINSON v. JOHNSTON*, D. C., 50 F. Supp. 744 one Robinson, a prisoner at Alcatraz, filed a petition for habeas corpus in 1939, alleging that he had not been represented by legal counsel and was sentenced under the Lindbergh Act for the crime of kidnapping. A new trial was granted, counsel obtained for him, the jury convicted him and the court sentenced him to death. The sentence was affirmed by the Circuit Court of Appeals, *ROBINSON v. UNITED STATES*, 144 F. 2d 392, 393, and by the Supreme Court of the United States at 324 U. S. 282, 65 S. Ct. 666, L. Ed. 629. Undoubtedly, it would therefore seem to be the rule in the Federal system that a trial judge, when a new trial is ordered, may impose a sentence greater than one he had earlier vacated, and that it is unnecessary to articulate the reason for any differentiation in the term of the sentence."

In *UNITED STATES v. WHITE*, 382 F. 2d 445 (7th Cir. 1967), the Seventh Circuit Court of Appeals specifically declined to follow the Fourth Circuit Court of Appeals decision in *PATTON v. NORTH CAROLINA*, 381 F. 2d 636, (4th Cir. 1967) and the First Circuit Court of Appeals decision in *MARANO v. UNITED STATES*, 374 F. 2d 583 (1st Cir. 1967). In determining that the imposition of a longer sentence at the second trial than was imposed at the first trial did not violate the due process clause of the Fourteenth Amendment nor the double jeopardy provision of the Fifth Amendment, the Seventh Circuit stated that "we approved of the statement of the Third Circuit in *UNITED STATES EX REL. STARNER v. RUSSELL*, No. 16392, (3rd Cir., May 25, 1967), that a trial judge, 'when a new trial is ordered, may impose a sentence greater than one he had earlier vacated, and . . . it is unnecessary to articulate the reason for any differentiation in the term of the sentence.'" 382 F. 2d at 449-50.

As to the argument that imposing a longer sentence at the second trial than was imposed at the first trial violated the double jeopardy provisions of the Fifth Amendment, the Seventh Circuit Court of Appeals stated: "Similarly as to the defendant's double jeopardy argument, we do not believe that

the Fifth Amendment prohibits different punishments upon reconviction for the same crime following a successful appeal when the punishment, whether imposed by the same or a different district judge, results from the judge's exercise of his traditional discretionary function of considering a variety of sentencing factors, many of which have no direct relationship to the crime itself.

"We are fully aware of the recent decisions of other courts, dealing with these and related questions, which have expressed views contrary in many respects to those expressed herein. We think, however, that the pronouncement of a constitutional principle as sweeping and inflexible as that discussed in certain of these decisions and urged here by the defendant should await the considered judgment of the Supreme Court, particularly as that Court may choose to refine or abandon whatever distinctions remain between *GREEN v. UNITED STATES*, 355 U. S. 184 (1957), and *STROUD v. UNITED STATES*, 251 U. S. 15 (1919)." 382 F. 2d 448.

Therefore, it is respectfully submitted that this Court should exercise its jurisdiction in granting the writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit in this case so that the conflict in the decisions rendered by the Fourth Circuit Court of Appeals and the decisions rendered by the Supreme Court of the State of North Carolina, and the conflict in the decisions from the various Circuit Courts of Appeal, on the question presented here, may be settled.

Respectfully submitted,

THOMAS WADE BRUTON,
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State of North Carolina

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COUNSEL FOR PETITIONERS

Appendix A

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION
NO. 1973 CIVIL

CLIFTON A. PEARCE

V.

ORDER

STATE OF NORTH CAROLINA,
WARDEN R. L. TURNER

THIS CAUSE coming on to be heard upon the application of Clifton A. Pearce, a state prisoner, for a writ of habeas corpus, the court finds the following facts:

That the petitioner was convicted by a jury at the May, 1961 term of the Superior Court of Durham County, of assault with intent to commit rape and was given a sentence of 12 to 15 years; that the petitioner sought post-conviction relief and was awarded a new trial by the Supreme Court of North Carolina¹ because of the use of an involuntary confession at his original trial; that petitioner was retried at the June, 1966 term of the Superior Court of Durham County, and convicted by a jury of assault with intent to commit rape; that in sentencing petitioner at the new trial, the trial judge stated that it was his intention to give the petitioner a sentence of fifteen years, but he was taking into consideration the time already served, and therefore sentenced him to eight years; that the petitioner appealed his conviction to the North Carolina Supreme Court² which affirmed his conviction; that the petitioner sought a post-conviction hearing in February of 1967 which was denied.

Petitioner alleges, *inter alia*; that he received a harsher sentence at his retrial and therefore the second sentence is void under the decision of *Patton v. State of North Carolina*.³ With this contention we must agree. The eight year sentence

petitioner received at his second trial gives him more than full credit for time served on the maximum length of the original sentence, but it does not give full credit on the minimum length of the original sentence.⁴ Now therefore, based upon the present record before this court, it is ORDERED AND ADJUDGED:

(1) That the sentence imposed on Clifton A. Pearce at the June 1966 session of the Superior Court of Durham County upon his conviction of assault with intent to commit rape is unconstitutional and void.

(2) That the State of North Carolina file in the office of the Clerk of this court in the Federal Building, Raleigh, North Carolina, within ten days after service of this order, a statement certifying whether or not said State elects to resentence the petitioner, Clifton A. Pearce.

(3) That the State of North Carolina proceed to resentence said Clifton A. Pearce within sixty days from the date of service of this order if said State should elect to resentence him.

(4) That if the State of North Carolina does not elect to resentence said petitioner, or if said State should elect to resentence him and fail to do so within the sixty (60) days prescribed, this court will entertain a motion on behalf of the petitioner for an order releasing him from all restraint imposed by virtue of the sentence of eight years imprisonment imposed at the June 1966 session of the Superior Court of Durham County upon his conviction of assault with intent to commit rape.

(5) That the United States Marshal serve forthwith a copy of this order upon the Honorable Dan K. Edwards, Solicitor of the Tenth Solicitorial District of North Carolina, Durham, North Carolina; and the Honorable V. Lee Bounds, Director of the North Carolina Department of Correction, Raleigh, North Carolina; that the Clerk shall serve a copy of this order by mail upon the Honorable T. Wade Bruton, Attorney General of North Carolina, Raleigh, North Carolina, and the petitioner, Clifton A. Pearce.

This November 17, 1967.

/s/ Algernon L. Butler
Chief Judge, U. S. District Court

A True Copy, Teste:
Samuel A. Howard, Clerk

By Norma G. Blackman
Deputy Clerk

¹ State of North Carolina v. Clifton A. Pearce, 266 N.C. 234, 145 S.E. 2d 918.

² State of North Carolina v. Clifton A. Pearce, 268 N.C. 707, 151 S.E. 2d 571.

³ Patton v. State of North Carolina, 381 F. 2d 636 (1967).

⁴ Patton v. Ross, 267 F. Supp. 387 (E.D.N.C. 1967), Hall v. Stallings, Civ. No. 1811, Raleigh Division (E.D.N.C. 1967).

CERTIFICATE OF SERVICE }

I hereby certify that on the 20th day of November, 1967, I served a copy of the foregoing order upon the Honorable T. Wade Bruton, Attorney General of North Carolina, Raleigh, North Carolina, and a copy upon the petitioner, Clifton A. Pearce, North Carolina Central Prison, 835 West Morgan Street, Raleigh, North Carolina, by depositing the same in the United States mail, postage prepaid, in envelopes addressed respectfully to each at their respective addresses.

SAMUEL A. HOWARD, Clerk
United States District Court

By Norma G. Blackman
Deputy Clerk

Appendix B

NORTH CAROLINA
DURHAM COUNTY

IN THE
SUPERIOR COURT

STATE OF NORTH CAROLINA)

v.)

CLIFTON A. PEARCE)

ORDER

This cause comes on to be heard pursuant to an Order dated the 17th of November, 1967 filed the 20th of November, 1967 in the United States District Court, Eastern District of North Carolina, and signed by the Honorable Algernon L. Butler, Chief Judge, United States District Court, Eastern District of North Carolina. The said Order provides as follows:

(1) That the sentence imposed on Clifton A. Pearce at the June 1966 Session of the Superior Court of Durham County upon his conviction of assault with intent to commit rape is unconstitutional and void.

(2) That the State of North Carolina file in the office of the Clerk of this Court in the Federal Building, Raleigh, North Carolina, within ten days after service of this Order a statement certifying whether or not said State elects to resentence the petitioner, Clifton A. Pearce.

(3) That the State of North Carolina proceed to resentence said Clifton A. Pearce within sixty days from the date of service of this Order if said State should elect to resentence him.

(4) That if the State of North Carolina does not elect to resentence said petitioner, or if said State should elect to resentence him and fail to do so within the sixty (60) days prescribed, this Court will entertain a motion on behalf of the petitioner for an order releasing him from

all restraint imposed by virtue of the sentence of eight years imprisonment imposed at the June 1966 Session of the Superior Court of Durham County upon his conviction of assault with intent to commit rape.

(5) That the United States Marshal serve forthwith a copy of this Order upon the Honorable Dan K. Edwards, Solicitor of the Tenth Solicitorial District of North Carolina, Durham, North Carolina; and the Honorable V. Lee Bounds, Director of the North Carolina Department of Correction, Raleigh, North Carolina; that the Clerk shall serve a copy of this Order by mail upon the Honorable T. Wade Bruton, Attorney General of North Carolina, Raleigh, North Carolina, and the petitioner, Clifton A. Pearce.

An examination of the records relating to this case discloses the following:

That the defendant Pearce was indicted by the Grand Jury upon the capital charge of rape of a 12-year-old girl. He was tried by a jury at the May 1961 Session of the Superior Court of Durham County and was convicted of assault with intent to commit rape and was sentenced to twelve to fifteen years in the State's prison. Upon the same day he was transferred to Central Prison in Raleigh. That thereafter the petitioner sought post-conviction relief and was awarded a new trial by the Supreme Court of North Carolina, 266 N.C. 234; 145 S.E. 2d 918. That thereafter the petitioner was retried upon a new bill of indictment charging the petitioner with the crime of assault with intent to commit rape, the said bill of indictment having been returned at the March 1966 Session of Superior Court of Durham County. He was again convicted by a jury. At this second trial in passing sentence upon the defendant Pearce, the Trial Judge entered this judgment: "It is the intention of this Court to give the defendant a sentence of fifteen years in the State Prison; however, it appears to the Court from the record available from the Prison Department that the defendant has served six years, six months, and seventeen days, flat and gain time combined, and the Court

in passing sentence in this case is taking into consideration the time already served by the defendant. It is the judgment of this Court that the defendant be confined in the State's prison for a period of eight years." That this conviction was appealed to the North Carolina Supreme Court. One of the questions raised on his appeal was his contention that the sentence given him at the second trial was in excess of that given him at his first trial. The Supreme Court of North Carolina affirmed his conviction. (268 N.C. 707; 151 S.E. 2d 571). Thereafter the petitioner sought by post-conviction hearing a new trial, which was denied.

The maximum punishment for the felony of assault with intent to commit rape in North Carolina is fifteen years.

The Court concludes the facts and the law in this case to be as follows:

The sentence at the second trial has been held by the Supreme Court of North Carolina to be properly and lawfully imposed under the law.

In this case the Federal District Court on a writ of habeas Corpus appears to assert that it will directly overrule the highest appellate court in the State of North Carolina on a specific question presented to and passed upon by the Supreme Court of North Carolina.

The Superior Court of North Carolina is the only Court in the State with the authority to sentence a person convicted for the felony of assault with intent to commit rape.

In this case the Federal District Court on a writ of habeas corpus is attempting by its Order to require the Superior Court of North Carolina to overrule the Supreme Court of North Carolina, and the Superior Court of North Carolina does not have such authority or power.

The writ of habeas corpus may not be used as a substitute for an appeal or writ of error.

Except for the original jurisdiction of the United States Supreme Court which flows directly from the Constitution, two prerequisites to jurisdiction must be present in the Federal Courts. First, the Constitution must have given the Courts the capacity to receive it; and second, an act of Congress must have conferred it.

There is no act of Congress conferring upon a Federal District Court the authority, the power, or the jurisdiction to require the Superior Court of the State of North Carolina to act in this matter.

There is no act of Congress conferring upon a Federal District Court the authority, the power, or the jurisdiction to direct the Superior Court of the State of North Carolina to act in opposition to a ruling of the Supreme Court of North Carolina.

This Court will not take or attempt to take action in direct contravention of the ruling of the Supreme Court of North Carolina.

The grounds upon which the Federal District Court is so ruling or asserting that it will act is that a greater sentence was imposed upon a second trial. The Supreme Court of the United States has not ruled that this is unconstitutional. At least two of the United States Circuit Courts of Appeals have ruled in the following language: "A trial judge, when a new trial is ordered, may impose a sentence greater than one he had earlier vacated, and it is unnecessary to articulate the reason for any differentiation in the term of the sentence."

The Order of the Federal District Court concedes that the petitioner is properly subject to imprisonment for his crime, and the Order of the Federal District Court (which is threatened in the present Order to be issued in sixty (60) days) which might result in the immediate release of the prisoner will be entirely contrary to law and contrary to the proper administration of justice.

A copy of this Order is directed to be mailed to the following: Honorable V. Lee Bounds, Director, North Carolina Department of Correction; Honorable T. Wade Bruton, Attorney General of North Carolina; and Honorable Dan K. Edwards, Solicitor of the Tenth Solicitorial District.

This the 30th day of November, 1967.

James H. Pou Bailey
Judge Presiding

Appendix C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION
No. 1973 — Civil

Clifton A. Pearce :

v. :

Writ of Habeas Corpus

State of North Carolina, :

Warden R. L. Turner :

This cause coming on to be heard upon motion of Clifton A. Pearce for an order releasing him from restraint imposed by virtue of the sentence of eight years imprisonment imposed at the June 1966 session of the Superior Court of Durham County upon his conviction of assault with intent to commit rape, and it appearing that an order was entered by this court on November 20, 1967, adjudging the said sentence imposed at the June 1966 session of the Superior Court of Durham County to be unconstitutional and void, and allowing the State of North Carolina sixty (60) days within which to impose a constitutional sentence, and providing further that if the State should fail to resentence the petitioner within the sixty (60) days prescribed, this court would entertain a motion on behalf of the petitioner for an order releasing him from all restraint imposed by virtue of said sentence; and it further appearing to the court that on November 30, 1967, the Superior Court of Durham County entered an order electing not to resentence the petitioner in accordance with the option granted by this court, and that said period of sixty (60) days has expired; that the court is of the opinion that the State of North Carolina has been afforded a reasonable opportunity within the sixty (60) days prescribed to resentence petitioner to a maximum term of imprisonment of not less than 12 nor more than 15 years in the State's prison, subject to credit for the time served on the prior invalidated sentence; that if the State had elected to resentence and to impose the maximum constitutional sentence,

after allowance of the required credit, there would still remain approximately six years of petitioner's sentence yet to be served; that this court is reluctant to release petitioner until he has fully paid his debt to society, but it is left with no alternative; that the petitioner's present sentence has been adjudged unconstitutional and void, and the State has refused to impose a constitutional and valid sentence; Now, therefore,

It is ORDERED AND ADJUDGED as follows:

(1) That the respondents release immediately Clifton A. Pearce from all restraint imposed by virtue of the sentence of eight years imprisonment imposed at the June 1966 session of the Superior Court of Durham County, North Carolina, upon his conviction of assault with intent to commit rape.

(2) That the United States Marshal serve forthwith a copy of this order upon the Honorable Dan K. Edwards, Solicitor of the Tenth Solicitorial District of North Carolina, Durham, North Carolina, the Honorable V. Lee Bounds, Director of the North Carolina Department of Correction, Raleigh, North Carolina; that the Clerk shall serve a copy of this order by mail upon the Honorable T. Wade Bruton, Attorney General of North Carolina, Raleigh, North Carolina, the petitioner, Clifton A. Pearce, and the respondent, R. L. Turner, Warden of Central Prison.

(3) That the effectiveness of this writ is stayed for a period of thirty (30) days from the date of service hereof to permit the respondents to appeal if they be so advised.

This 1st day of February, 1968.

Algernon L. Butler
Chief Judge, United States District Court

A True Copy, Teste:
Samuel A. Howard, Clerk

By Joyce W. Todd
Deputy Clerk

CERTIFICATE OF SERVICE

I have this date _____, 1968, served a certified copy of the above writ upon the Honorable Dan K. Edwards, Solicitor of the Tenth Solicitorial District of North Carolina, Durham, North Carolina, and the Honorable V. Lee Bounds, Director of the North Carolina Department of Correction, Raleigh, North Carolina.

United States Marshal

I have this date February 2, 1968, served a copy by mail upon the Honorable T. Wade Bruton, Attorney General of North Carolina, Raleigh North Carolina, the petitioner, Clifton A. Pearce, and the respondent, R. L. Turner, Warden of Central Prison, Raleigh, North Carolina.

Samuel A. Howard, Clerk

Joyce W. Todd
Deputy Clerk, U. S. District Court

Appendix D
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 12,256.

Clifton A. Pearce,
Appellee,

versus

State of North Carolina and Warden R. L. Turner,
Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF NORTH CAROLINA, AT RALEIGH.
ALGERNON L. BUTLER, CHIEF JUDGE.

(Submitted June 10, 1968. Decided June 19, 1968.)

Before HAYNSWORTH, Chief Judge, and BRYAN and WINTER, Circuit Judges.

T. W. Bruton, Attorney General of North Carolina, Andrew A. Vanore, Jr., and Dale Shepherd, Staff Attorneys, Office of the Attorney General of North Carolina, on brief for Appellants, and Larry B. Sitton (Court-assigned counsel) and Smith, Moore, Smith, Schell & Hunter on brief for Appellee.

PER CURIAM:

The district court issued a writ of habeas corpus and ordered the release of petitioner for the reason that he had served the maximum term imposed on him at his original trial notwithstanding that on retrial, after successful post-conviction attack, he was sentenced to a longer term. The action was taken on the authority of our decision in *Patton v. North Carolina*, 381 F.2d 636 (4 Cir. 1967), *cert. den.*, *North Carolina v. Patton*, 390 U.S. 905 (1968).

In this appeal, the State of North Carolina frankly asks us to reconsider our decision in *Patton* in the light of cases considered therein which reached a contrary conclusion and subsequent decisions which have failed to follow it. This we decline to do; and because the issue on appeal is so narrow, we concluded to dispense with oral argument.

On the authority of *Patton*, the order of the district court is

Affirmed.

No. **418**

FILED

AUG 19 1968

JOHN F. DAVIS, CLE

In The

Supreme Court of the United States

OCTOBER TERM, 1968

**CURTIS M. SIMPSON, Warden, Kilby Prison,
Montgomery, Alabama**

PETITIONER

VS.

**WILLIAM S. RICE,
RESPONDENT**

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

**MacDONALD GALLION
Attorney General of Alabama**

**PAUL T. GISH, JR.
Assistant Attorney General
of Alabama**

**ATTORNEYS FOR PETITIONER
Administrative Building
Montgomery, Alabama 36104**

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In The
Supreme Court of the United States

OCTOBER TERM, 1968

**CURTIS M. SIMPSON, Warden, Kilby Prison,
Montgomery, Alabama,**

PETITIONER

VS.

WILLIAM S. RICE,

RESPONDENT

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

Curtis M. Simpson, as Warden of Kilby Prison, Montgomery, Alabama, by and through the Attorney General of the State of Alabama, MacDonald Gallion, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on May 30, 1968.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit affirming the United States District Court for the Middle District of Alabama granting the petition for writ of habeas corpus is dated May 30, 1968, and is unreported to date. This opinion and the judgment thereon is printed in Appendix A and A-1 hereto, *infra*, pp. 12-14.

The opinion of the United States District Court for the Middle District of Alabama granting the respondent's motion to file a *forma pauperis* his application for a writ of habeas corpus, dated July 17, 1967, is reported as *Rice v. Simpson*, 271 F. Supp. 267, and is printed in Appendix B hereto, *infra*, pp. 15-18.

The opinion of the United States District Court for the Middle District of Alabama granting the writ of habeas corpus is dated September 26, 1967, is reported as *Rice v. Simpson*, 274 F. Supp. 116, and is printed in Appendix C hereto, *infra*, pp. 19-32.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Fifth Circuit was entered on May 30, 1968 (R. p. 150, p. 14, *infra*). The jurisdiction of this Honorable Court is invoked under Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED

I

Whether a State court may increase punishment following a new trial on a plea of not guilty where the first sentence imposed on a plea of guilty is vacated on the prisoner's contention that he was denied counsel at the first trial.

II

Whether, under the Fourteenth Amendment to the Constitution of the United States and under the facts and circumstances of this case, it was constitutionally permissible to deny to the respondent credit on subsequent valid sentences for time served on a prior void judgment.

CONSTITUTIONAL PROVISION INVOLVED

Fourteenth Amendment to the Constitution of the United States.

STATEMENT

The respondent, William S. Rice, filed in forma pauperis his application for writ of habeas corpus in the United States District Court for the Middle District of Alabama. (R. p. 5.). He alleged that in the Circuit Court of Pike County, Alabama, in February 1962, upon pleas of guilty in four separate criminal cases, he was sentenced to a total of ten (10) years in the State penitentiary. He further alleged that in August, 1964, the judgments and sentences in these cases were set aside by said State court after a hearing upon his application for writ of error coram nobis. The basis for this action was that the respondent was not represented by counsel at the time he entered his pleas of guilty in 1962. The respondent also alleged that in December, 1964, he was retried in Case No. 6427, and in Case No. 6428, and was sentenced to a term of ten (10) years in each case. He also stated that in May, 1965, he was convicted in Case No. 6430, and sentenced to a term of five (5) years. Case No. 6429 was nol prossed on the motion of the State Solicitor in May, 1965.

The respondent contended that the Circuit Court of Pike County, Alabama, failed to give him credit for prior time served on one of his original sentences and that the sentences resulting in his present incarceration violated his constitutional rights in that said sentences constitute punishment for

his having exercised his right and having been successful in a State post-conviction proceeding. The respondent contended that it is not constitutionally permissible for the State of Alabama to deny him credit for time served on his void sentence, and that a State trial court may not constitutionally impose sentences greater than those imposed upon his first trial.

The United State District Court allowed the filing of the application for writ of habeas corpus and denied the petitioner's motion to dismiss. (R. p. 56.)

After a hearing on the merits of the case (R. pp. 79-143) said District Court held that the State of Alabama must give the respondent credit for the time he served upon the void sentence imposed in February, 1962, in Case No. 6427. Said Court also held that the maximum time which could constitutionally be imposed by the Circuit Court of Pike County, Alabama, upon the respondent was four (4) years in Case No. 6427, two (2) years in Case No. 6428, and two (2) years in Case No. 6430. The Court also ordered that under its calculation the excess time which had been served in Case No. 6427 to the date of the Court's order must be credited to Case No. 6428 and Case No. 6430. (R. pp. 57 - 73.)

The effect of the order of said District Court was that the respondent had finished serving his sentence in Case No. 6427 and that he must be given credit for excess time served, as such time was calculated by the Court, toward the sentences in Cases No. 6428 and 6430.

Curtis M. Simpson, as Warden of Kilby Prison, Montgomery, Alabama, took an appeal to the United States Court of Appeals for the Fifth Circuit (R. p. 74) and on May 30, 1968, said Circuit Court of Appeals affirmed the order and judgment of the United States District Court for the Middle District of Alabama. (See Appendix A hereto, infra, pp. 12-13).

REASONS FOR GRANTING THE WRIT

The United States Circuit Courts of Appeals have rendered conflicting opinions in regard to the two questions presented by this petition. Both of these questions are of great importance to the States.

I.

The first question presented is whether, under the facts of the case at bar, a State trial court can constitutionally subject a person to a more severe punishment upon his second conviction under an indictment than was imposed upon him on his first conviction under such indictment.

The United States Courts of Appeals for the Third and Seventh Circuits have held that a state may impose upon one convicted at a new trial of the same crime of which he was previously convicted a more severe sentence than was imposed upon his earlier conviction.

In the case of *United States v. Russell*, 378 F. 2d 808 (3rd Cir. 1967) the Court considered an appeal from a habeas corpus proceeding, the facts of which are strikingly similar to the case at bar. It was there held that imposing a greater sentence on fewer counts after a new trial of the case before a jury than was given the petitioner on his plea of guilty at his first trial did not violate constitutional standards of due process. The Court said, in part, as follows:

"While we are wholeheartedly in agreement with the principles laid down in *Gideon v. Wainwright*, * * *, it must be conceded that only the fact of not being represented by counsel in the pre-court proceedings gave him the second opportunity to plead his case and he chose to go to trial and have a jury test the accusations against him. When he appeared and entered a plea of not guilty at the second trial,

the slate had been wiped clean and it was an entirely new case and bore no relationship whatsoever to his previous plea of guilty which he had entered."

In the case of *United States v. White*, 382 F. 2d 445 (7th Cir. 1967), the Court held that different punishments may be imposed upon reconviction of the same crime following a successful appeal when the punishment results from the judge's exercise of his judicial discretionary function of considering a variety of sentencing factors, many of which have no direct relationship to the crime itself.

Recent cases holding to the contrary include *Patton v. North Carolina*, 381 F. 2d 636 (4th Cir. 1967), and *Marano v. United States*, 374 F. 2d 583 (1st Cir. 1967).

The following cases support, either expressly or by implication the view that a defendant, in obtaining a new trial, assumes the risk of a more severe sentence than was first imposed should he again be convicted of the same crime under the same indictment:

ROBINSON V. UNITED STATES,

144 F. 2d 392 (6th Cir.)
Cert. Den. 324 U. S. 282,
89 L. Ed. 629, 65 S. Ct. 666;

HOBBS V. STATE,

231 Md. 533, 191 A. 2d 238,
Cert. Den. 375 U. S. 914,
11 L. Ed. 2d 153, 84 S. Ct. 212;

HICKS V. COMMONWEALTH,

345 Mass. 89, 195 N. E. 2d 739,
Cert. Den. 374 U. S. 839,
10 L. Ed. 2d 1060, 83 S. Ct. 1891;

STATE V. WHITE,
 262 N. C. 52, 136 S. E. 2d 205,
 Cert. Den. 379 U. S. 1005,
 13 L. Ed. 2d 707, 85 S. Ct. 726.

This Honorable Court held in *Stroud v. United States*, 251 U. S. 15, 64 L. Ed. 103, 40 S. Ct. 50, that a prisoner's constitutional rights were not violated when he was convicted of first degree murder with the death penalty after reversal of a first conviction of the same degree but with a life sentence. This is the only case in which this Honorable Court has heretofore written to the question involved.

Sentences totaling five years more of imprisonment than were imposed upon the first trial for armed robbery were affirmed in *Hobbs v. State*, supra. The Court in this case rejected the contention that the imposition of new sentences in the second trial, resulting in a greater period of confinement, were unlawful. The Court declared that ordinarily any punishment authorized by statute and within the statutory limits was not cruel and unusual, and held that in asking for and receiving a new trial a defendant must accept the hazards as well as the benefits resulting therefrom.

Courts have recognized that pleas of guilty are the result of a bargain or agreement with the prosecutor and that a guilty defendant must always weigh the possibility of receiving a more severe sentence on a plea of not guilty than he will receive as a result of an agreement with the prosecutor for a lighter sentence.

In Alabama maximum sentences which may be imposed upon persons convicted of crime are fixed by statutes. The effect of the judgment of the court below in the case at bar is to reduce this statutory maximum as to the respondent. If said judgment is allowed to stand the trial courts of the State of Alabama will not be allowed to impose maximum sentences upon convictions after pleas of not guilty in cases

in which the accused has been previously sentenced to short terms upon pleas of guilty.

The judgment below approves the finding of the District Court that no justification is shown in the case at bar for more severe punishment after reconviction. ~~It~~ is respectfully submitted that the petitioner should not have been required to show any fact other than the fact that the first conviction was on a plea of guilty and the second conviction was imposed only after a trial on a plea of not guilty. One accused of crime is in many instances given a lighter sentence when he enters a plea of guilty than when he is convicted after insisting that he is not guilty. It is our contention that this is a healthy situation from the standpoint of the accused as well as from the standpoint of society. See *United States v. Russell*, supra.

While we recognize that some courts hold a more severe punishment on a second trial to be unconstitutional, this Honorable Court has never so held and we respectfully submit that the better and more just reasoning is found in those cases which hold that a new trial bears no relationship to a previous plea of guilty and begins with the slate wiped clean.

II.

The opinion of the court below, found in Appendix A hereto, infra, which adopts the opinion of the District Court for the Middle District of Alabama, found in Appendix C, hereto, infra, held that it is not constitutionally permissible for the State of Alabama to deny to the respondent credit for time served on a void judgment to be applied to sentences imposed by subsequent valid judgments. Said opinion of the court below is in direct conflict with the case of *Newman v. Rodriguez*, 375 F. 2d 712 (10th Cir. 1967).

In Alabama a State prisoner is given credit for time served on a void sentence when there is another valid sentence pending against him during the period such time is served.

Hill v. Holman, 255 F. Supp. 924. See also *Youst v. United States*, 151 F. 2d 666 (5th Cir. 1945). These cases should not control the case at bar.

In the case of *Hill v. Holman*, *supra*, which was decided by the same United States District Court before which the case at bar was originated, a writ of habeas corpus was granted and a State prisoner was held entitled to his immediate release. The opinion of said District Court in that case was very broad and the dictum found therein would control the case at bar if the facts of the two cases were identical. However, such facts were not identical since the prisoner involved in the case of *Hill v. Holman*, *supra*, had actually served the time imposed upon him under all his valid sentences at the time of his release.

The case of *Youst v. United States*, *supra*, does not control the case at bar since the opinion in that case applied credit for time served under a void judgment to a valid sentence which existed during the period such time was served.

The case of *Hill v. Holman*, *supra*, cites *Hoffman v. United States*, 244 F. 2d 378 (9th Cir. 1957). The *Hoffman* case recognizes the principle that time served should be applied to existing valid sentences, however, the prisoner in said case was not released because he had not been incarcerated for a time equal to his sentences under admittedly valid judgments.

As pointed out hereinabove the judgment of the court below is in direct conflict with the case of *Newman v. Rodriguez*, *supra*, which held that the denial to a State prisoner of credit for time served on a void judgment was constitutionally permissible. The facts of that case are similar to the facts in the case at bar. In the case at bar as well as the *Newman Case* there was no valid judgment pending against the prisoner at the time his conviction was declared to

be void. Cf. *Meyers v. Hunter*, 160 F. 2d 344 (8th Cir. 1947);
Cert. Den. 331 U.S. 852, 91 L.Ed. 1860, 67 S. Ct. 1730.

In footnote 6 to the order of the District Court in the case at bar (Appendix C, *infra*), the Court recognizes that its holding is in conflict with the opinion rendered in the case of *Newman v. Rodriguez*, *supra*.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

MacDONALD GALLION

Attorney General of Alabama

PAUL T. GISH, JR.

Assistant Attorney General
of Alabama

Counsel For Petitioner

CERTIFICATE

I, Paul T. Gish, Jr., one of the attorneys for the petitioner, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 16th day of August 1968, I served two copies of the foregoing petition for writ of certiorari on the respondent and on one of his attorneys of record, by mailing such copies in a duly addressed envelope, to the respondent and to the attorney as follows:

To: Mr. William S. Rice
Kilby Prison
Route 3, Box 115
Montgomery, Alabama

To: Honorable Oakley W. Melton, Jr.

Attorney at Law

Steiner, Crum and Baker

1109-25 First National Bank Building

Montgomery, Alabama 36101

PAUL T. GISH, JR.

Assistant Attorney General
of Alabama

Administrative Building

Montgomery, Alabama 36104

APPENDIX A
IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 25412

CURTIS M. SIMPSON, Warden, Kilby Prison,
Montgomery, Alabama,

Appellant,

versus

WILLIAM S. RICE,

Appellee.

Appeal from the United States District Court for the
Middle District of Alabama.

(May 30, 1968.)

Before TUTTLE and DYER, Circuit Judges, and
MEHRTENS, District Judge.

TUTTLE, Circuit Judge: William S. Rice in February, 1962, entered pleas of guilty in four separate criminal cases in the Circuit Court of Pike County, Alabama. He was sentenced to a total of ten years in the state penitentiary, the term consisting of four separate sentences, the first for four years and the remaining three for two years each. In August, 1964, the judgments and sentences in these cases were set aside by the Circuit Court of Pike County in a coram nobis proceeding on the ground that appellee was not represented by counsel at the time of his original pleas.

The petition for habeas corpus to the District Court alleged that the appellee was retried in three of the four cases at which time the same trial court sentenced him to a total of twenty-five years, the term consisting of a sentence of ten years on each of the first two charges and five years on the third. The fourth charge was dismissed because of the absence of a witness. Rice attacked these subsequent sentences to the extent that they exceeded the original sentences on the original pleas of guilty and to the extent that they did not also give him credit for the time served under the vacated sentences.

The trial court overruled the State's motion to dismiss the petition for failure to exhaust state remedies, there being at the time of the hearing no adequate state procedure which the appellee was required to pursue. Although an intervening decision by the Court of Appeals of Alabama, *Goolsby v. State*, Sixth Division 202 (not reported) might have some bearing on the merits of this case, under the principles of *Fay v. Noia*, 372 U. S. 391, we should not remand the case to require the appellee to pursue a state remedy at this stage of the proceedings.

The District Court entered a judgment granting the relief sought by the appellee. It would be useless for us to add to the reasoning or conclusions announced by the trial court whose opinion may be found at 271 F. Supp. 267. We, therefore, affirm the judgment of the trial court on the basis of Judge Johnson's opinion which is adopted as the opinion of this court.

The judgment is **AFFIRMED**.

(Note: The citation found in the last paragraph of this opinion should be 274 F. Supp. 116. The order of the District Court granting the respondent permission to file his petition in forma pauperis is reported at 271 F. Supp. 267.)

APPENDIX A-1
 UNITED STATES COURT OF APPEALS
 FOR THE FIFTH CIRCUIT

October Term, 1967

No. 25412

D. C. Docket No: CA 2583-N
 CURTIS M. SIMPSON, Warden, Kilby Prison,
 Montgomery, Alabama,
 Appellant,

versus

WILLIAM S. RICE,
 Appellee.

Appeal from the United States District Court for the
 Middle District of Alabama.

Before TUTTLE and DYER, Circuit Judges and
 MEHRTENS, District Judge.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

It is further ordered and adjudged that the appellant, Curtis M. Simpson, Warden, Kilby Prison, Montgomery, Alabama, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

May 30, 1968

Issued as Mandate: June 21, 1968

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE

DISTRICT OF ALABAMA, NORTHERN DIVISION

William S. Rice,
Petitioner,

vs.

Curtis M. Simpson, Warden,

Kilby Prison, Montgomery,

Alabama,

Respondent.

Civil Action No. 2583-N

ORDER

Petitioner now presents to this Court his application for a writ of habeas corpus. He alleges that in the Circuit Court of Pike County, Alabama, in February 1962, upon his pleas of guilty in state court criminal cases Nos. 6427, 6428 and 6429, he was sentenced by said state court to an aggregate of eight years in the state penitentiary. Petitioner alleges, further, that in August 1964 his pleas, and the judgment and sentence thereon in each of said state court cases, were set aside upon his application, and the proof offered in support thereof, for the writ of error coram nobis. The petition now presented to this Court further avers that in December 1964 he was retried and, upon conviction in the same circuit court, was sentenced to a term of ten years in case No. 6427, ten years in case No. 6428, and in May 1965, after a conviction, was sentenced to a term of five years in case No. 6429. Thus, the sentences, after petitioner was successful in his coram nobis proceeding and after he was retried and convicted, now aggregate twenty-five years.

Petitioner alleges that, in resentencing him, the Circuit Court of Pike County failed to give him credit for prior time served on the original sentences, and he alleges, further, that the sentences resulting in his present incarceration that were imposed by the Circuit Court of Pike County, Alabama, in December 1964 and May 1965, which sentences aggregate over three times the aggregate sentences originally imposed in said cases, violate his constitutional rights in that said greater sentences constitute punishment for his having exercised and been successful in his post-conviction *coram nobis* proceeding. Petitioner alleges that it is constitutionally impermissible for the State of Alabama to force upon him the risk (here, a reality) of more severe punishment as a penalty for his having exercised and been successful in Alabama post-conviction proceedings.

Petitioner very candidly admits that he has not presented this issue to the courts of the State of Alabama since he was reconvicted and resentenced by the Circuit Court of Pike County, Alabama, in December 1964 and May 1965. He argues, instead, that his case is one of "exceptional circumstances" in that there is an absence of available state corrective processes in his case.

Upon an examination of the petition as now presented and the excellently written argument filed in support thereof, this Court is of the opinion that petitioner is afforded no post-conviction remedies by the State of Alabama where his only contentions, in support of his claim that his present incarceration is unconstitutional, are (1) that he was not given credit on resentencing for prior time served upon sentences which were later set aside by the courts of the State of Alabama as being unconstitutional, and (2) that the sentences resulting in his present incarceration were imposed as, and serve as, punishment for his having exercised and been successful in Alabama post-conviction proceedings. In this connection, Judge Cates, speaking for the Alabama Court of Appeals in *Aaron v. State*, 192 So. 2d 456 (Nov. 29, 1966) wrote:

"Moreover, we do not think that Alabama affords, after motion for new trial wherein the trial judge's power over judgment is kept alive, any post conviction remedy to assert that a sentence is invalid because of a claim of excessiveness if the second sentence does not go beyond the statutory limit. *Isbell v. State*, 42 Ala. App. 498, 169 So. 2d 27. Our Supreme Court has failed to adopt any general rule that our remedy of coram nobis automatically assimilates all rights imposed on state trials by the Fourteenth Amendment. See *Wilson, Federal Habeas Corpus and the State Court Criminal Defendant*, 19 Vand. L. Rev. 741."

And, again, the same Judge, speaking for the same court, in March 1967 in *Ex Parte Merkes*, reiterated the above-quoted statement from the *Aaron* case and stated further, "We see no reason to go into what should be the rule of credit for prior time until we have to."

The above cases, appearing to represent the law of the State of Alabama upon the questions now presented in petitioner's application, make it apparent that Title 28, §2254 of the United States Code, does not bar the filing of petitioner's application for the writ of habeas corpus as now presented.

Accordingly, it is the ORDER, JUDGMENT and DECREE of this Court that the motion of William S. Rice, presented to this Court on July 13, 1967, seeking leave to file his application for a writ of habeas corpus in forma pauperis, be and the same is hereby granted. The clerk of this Court is ORDERED and DIRECTED to file without the prepayment of fees and costs the petition for a writ of habeas corpus now presented to this Court by William S. Rice.

It is the further ORDER, JUDGMENT and DECREE of this Court that Curtis M. Simpson, Warden of Kilby Prison, Montgomery, Alabama, and/or any other appropriate official

acting for or in behalf of the State of Alabama, on or before August 4, 1967, show cause, if any there be, why this Court should not issue the writ of habeas corpus as herein prayed for by the petitioner, William S. Rice.

It is further ORDERED that the Honorable Oakley W. Melton, Jr., of Montgomery, Alabama, be and he is hereby appointed to represent William S. Rice in this action.

It is further ORDERED that a copy of this order be served upon the said Curtis M. Simpson as Warden of Kilby Prison and that copies be mailed by certified mail to the Honorable MacDonald Gallion, Attorney General, State of Alabama, Montgomery, Alabama, to the Honorable Oakley W. Melton, Jr., Attorney at Law, Montgomery, Alabama, and to the petitioner, William S. Rice, in care of the Warden of Kilby Prison, Montgomery, Alabama.

Done, this the 17th day of July, 1967.

Frank M. Johnson Jr.

United States District Judge

APPENDIX C
IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE
DISTRICT OF ALABAMA, NORTHERN DIVISION

William S. Rice,

Petitioner,

vs.

Curtis M. Simpson, Warden,

Kilby Prison, Montgomery,

Alabama,

Respondent.

Civil Action No. 2583-N

ORDER

The petitioner, William S. Rice, by leave of this Court, files in forma pauperis his application for a writ of habeas corpus. He alleges that in the Circuit Court of Pike County in February 1962, upon pleas of guilty in four separate state court criminal cases, he was sentenced to an aggregate of ten years in the state penitentiary. Petitioner alleges, further, that in August 1964, his pleas and the judgment and sentence thereon in each of said state court cases were set aside by the Circuit Court of Pike County, Alabama, upon his application for a writ of error coram nobis and the proof offered in support thereof. The basis for the state court's action was that petitioner was not represented by counsel as constitutionally required by *Gideon v. Wainwright*, 372 U. S. 335. The petition now presented avers that in December 1964 he was retried in state cases Nos. 6427 and 6428, and upon conviction in the

¹In case No. 6427, he was sentenced to four years and in cases Nos. 6428, 6429 and 6430, he was sentenced to two years in each case; the sentences were to be served consecutively.

same circuit court, before the same circuit judge, he was sentenced to a term of ten years in No. 6427 and ten years in No. 6428. Petitioner further alleges that in May 1965 in case No. 6430, after conviction, he was sentenced to a term of five years. Case No. 6429 was nol-prossed on motion of the state solicitor in May 1965. Thus, the sentences, after petitioner was successful in his coram nobis proceeding and after he was retried and convicted in these second degree burglary cases—which, by statute in Alabama, carry a maximum sentence of ten years each—now aggregate twenty-five years.

Petitioner contends that in resentencing him the State of Alabama, acting through the circuit judge of the Circuit Court of Pike County, Alabama, failed to give him credit for prior time served on the original sentence; and he alleges, further, that the sentences resulting in his present incarceration that were imposed by the Circuit Court of Pike County in December 1964 and in May 1965, which sentences amount to over three times the aggregate sentences originally imposed in said cases, violate his constitutional rights in that said greater sentences constitute punishment for his having exercised his right to and for having been successful in a post-conviction coram nobis proceeding. Petitioner contends that it is constitutionally impermissible for the State of Alabama to deny him credit for the time served on the void sentence and to force upon him the risk—here a reality—of more severe punishment as a penalty for his having exercised his right to and for having been successful in Alabama post-conviction proceedings. Petitioner did not present either of these issues to the courts of the State of Alabama on the question of exhaustion of state remedies as a state prisoner is ordinarily required to do under 28 U. S. C. § 2254. Petitioner takes the position that his case is one of "exceptional circumstances" in that there is an absence of available state corrective processes.

Upon an examination of the petition as presented, this Court, by formal order entered on July 17, 1967, held that 28 U. S. C. § 2254 did not bar the filing of petitioner's application for a writ of habeas corpus in this court. In making this determination, the Court stated:

"Upon an examination of the petition as now presented and the excellently written argument filed in support thereof, this Court is of the opinion that petitioner is afforded no post-conviction remedies by the State of Alabama where his only contentions, in support of his claim that his present incarceration is unconstitutional, are (1) that he was not given credit on resentencing for prior time served upon sentences which were later set aside by the courts of the State of Alabama as being unconstitutional, and (2) that the sentences resulting in his present incarceration were imposed as, and serve as, punishment for his having exercised and been successful in Alabama post-conviction proceedings. In this connection, Judge Cates, speaking for the Alabama Court of Appeals in *Aaron v. State*, 192 So. 2d 456 (Nov. 29, 1966), wrote:

"Moreover, we do not think that Alabama affords, after motion for new trial wherein the trial judge's power over judgment is kept alive, any post conviction remedy to assert that a sentence is invalid because of a claim of excessiveness if the second sentence does not go beyond the statutory limit. *Isbell v. State*, 42 Ala. App. 498, 169 So. 2d 27. Our Supreme Court has failed to adopt any general rule that our remedy of coram nobis automatically assimilates all rights imposed on state trials by the Fourteenth Amendment. See *Wilson, Federal Habeas Corpus and the State Court Criminal Defendant*, 19 Vand. L. Rev. 741."

And, again, the same Judge, speaking for the same court, in March 1967 in *Ex Parte Merkes* [198 So. 2d 789, 790], reiterated the above-quoted statement from the *Aaron* case and stated further, "We see no reason to go into what should be the rule of credit for prior time until we have to."

"The above cases, appearing to represent the law of the State of Alabama upon the questions now presented in petitioner's application, make it apparent that Title 28, § 2254 of the United States Code, does not bar the filing of petitioner's application for the writ of habeas corpus as now presented."

Accordingly, the respondent Warden of Kilby Prison was directed to show cause why the writ of habeas corpus as prayed for by the petitioner, William S. Rice, should not be issued. Upon petitioner's request, the Honorable Oakley W. Melton, Jr., Attorney at Law, Montgomery, Alabama, was appointed to represent the petitioner. The case was set for oral hearing before the Court, and now, upon the pleadings, the evidence, and the briefs and arguments of the parties, this Court proceeds to make the appropriate findings of fact and conclusions of law.

The evidence presented is uncontroverted. Petitioner's allegations as above outlined are admitted except the conclusions that he makes as to the reason for the imposition of greater sentences on being resentenced after his "successful" post-conviction proceeding. Petitioner was originally sentenced in the four cases, Nos. 6427, 6428, 6429 and 6430, on February 16, 1962. He entered upon the service of the four-year sentence imposed in No. 6427 on February 16, 1962. He continued upon the service of this four-year sentence until the

¹See Title 45, § § 253, 256, Code of Alabama (1940) (Decomp. 1958).

sentence was set aside by the Circuit Court of Pike County, Alabama, on August 28, 1964. Petitioner earned no statutory and industrial good time during this period of service by reason of infractions of prison rules. However, he did not lose any of the 2 years, 6 months and 12 days he had served on No. 6427 from February 16, 1962 until August 28, 1964. When petitioner was resentenced in December 1964 to ten years in case No. 6427, he was not given any credit on that sentence, nor on the other sentences imposed in Nos. 6428 and 6430, for the time he had previously served on the sentence in No. 6427 that had been declared void by the State of Alabama. As this Court stated in *Jesse Vincent Hill v. William C. Holman, Warden*, 255 F. Supp. 924 (1966):

"The constitutional requirements of due process will not permit the State of Alabama to require petitioner Hill, or any other prisoner for that matter, to be penalized by service in the state penitentiary because of an error made by the state circuit court. Petitioner Hill was entitled to have the illegal sentence vacated. This, of course, was done by the Circuit Court of Jefferson County, Alabama, on September 8, 1964. He is also entitled to have the time he served on the erroneous sentence in case No. 91715 before it was vacated applied on the valid sentence that was imposed in that case by the Circuit Court of Jefferson County, Alabama, on September 8, 1964. This means very simply that Hill has more than served the legal sentence imposed upon him in case No. 91715. The record in this case is clear that, instead of Hill's owing the State of Alabama any additional time, the State of Alabama owes Hill for illegal incarceration for a period of between four and five years. He is due to be released immediately. *Youst v. United States* (5th Cir. 1945), 151 F. 2d 666; *Hoffman v. United States* (9th Cir. 1957), 240 F. 2d 378."

And the Fourth Circuit in *Patton v. North Carolina*, June 14, 1967, 35 Law Week 2737, stated:

"It is grossly unfair for society to take five years of a man's life and then say, we now acknowledge that this should not have happened, but we will set everything right by refusing to recognize that it did happen"

This rule of due process is applicable in this case and will not allow the State of Alabama to permit petitioner to be penalized by service in the state penitentiary because of an error the Circuit Court of Pike County made in case No. 6427. Petitioner Rice was constitutionally entitled to have the sentence imposed upon him in case No. 6427 (and also in cases Nos. 6428, 6429 and 6430) vacated. This, of course, was done by the Circuit Court of Pike County, Alabama, on August 28, 1964. He was also constitutionally entitled, upon being resentenced in case No. 6427, to be given credit for each of the days he had served upon the voided sentence that had been imposed on February 16, 1962. In addition, he was constitutionally entitled to any statutory and/or industrial good time allowance that he may have earned upon the service of the sentence in case No. 6427 from February 16, 1962 until August 28, 1964. In this connection, see *Short v. United States* (D.C. Cir. 1965), 344 F. 2d 550.

The second issue presented in this case concerns whether the State of Alabama, acting through the Circuit Court of Pike County, Alabama, violated petitioner Rice's constitutional rights by subjecting him to more severe punishment upon his being resentenced in cases Nos. 6427, 6428 and 6430, after the prior sentences in these cases had been declared void and set aside in a post-conviction coram nobis proceedings initiated by Rice in the state court. This Court, after considerable study, has concluded that sentence imposed by a court on retrial after post-conviction attack that is harsher than the sentence originally imposed — unless some justification

appears therefor — violates the Due Process Clause of the Constitution of the United States. *Marano v. United States* (1st Cir., March 1967), 374 F. 2d 583.

In the *Marano* case, the defendant was convicted in the United States District Court for the District of Massachusetts. Upon appeal, the First Circuit Court of Appeals ordered a new trial. *Kitchell v. United States*, 354 F. 2d 715 (1st Cir. 1966). On the second trial, Marano was again convicted, and upon his second conviction he was given a five-year sentence as opposed to the three-year sentence in the first case. When this issue was presented to the First Circuit Court of Appeals, it was stated:

"As we have recently held, a defendant's right of appeal must be unfettered. *Worcester v. Commissioner of Internal Revenue*, 1 Cir., 1966, 370 F. 2d 713. So far as sentence is concerned, this principle cannot be restricted to those situations in which a defendant, in deciding whether to appeal, must contemplate the certainty of an increased sentence if he obtains a new trial and is convicted again. Not only must he not be faced with such certainty, *Worcester v. Commissioner of Internal Revenue*, *supra*, he likewise should not have to fear even the possibility that his exercise of his right to appeal will result in the imposition of a direct penalty for so doing. Accord, *Patton v. State of North Carolina*, W.D.N. Car., 1966, 256 F. Supp. 225, 80 Harv. L. Rev. 891. But cf. *Hayes v. United States*, 1957, 102 U.S. App. D.C. 1, 249 F. 2d 516, 517, cert. den. 356 U.S. 914, 78 S. Ct. 672, 2 L. Ed. 2d 586. But, equally, the judge should not be permitted to change his mind by deciding that he had been too lenient the first time, as was suggested here during oral argument, or, if a new judge, by having a different approach towards sentencing. We do not approve the contrary decision in *Shear v.*

Boles, N.D.W. Va., 2/3/67, 263 F. Supp. 855, cited to us by the government. Such possibilities, if they had to be recognized, might well be substantial deterrents to a decision to appeal." [Footnotes omitted.]

In *Patton v. North Carolina*, in dealing with this question of a more severe sentence being imposed when a defendant is resentenced after post-conviction proceedings have resulted in voiding the original conviction, the Fourth Circuit stated:

"The risk of a denial of credit or the risk of a greater sentence, or both, on retrial may prevent defendants who have been unconstitutionally convicted from attempting to seek redress. For this reason the district court declared that predicating [defendant's] constitutional right to petition for a fair trial on the fiction that he has consented to a possibly harsher punishment, offends the Due Process Clause of the Fourteenth Amendment. * * *

"The district court held that [defendant's] punishment could not be increased unless evidence justifying a harsher sentence appeared in the record, and that the state must bear the burden of showing that such facts were introduced at the second trial, since 'where the record disclosed no colorable reason for harsher punishment,' the effect would be to inhibit the constitutional right to seek a new trial. * * *

"We do not think, however, that defendant's rights are adequately protected even if a second sentencing judge is restricted to increasing sentence only on the basis of new evidence. We are in accord with the First Circuit, *Marano v. U.S.*, 35 LW 2580, which has recently held that a sentence may not be increased following a successful appeal, even where additional testimony has been introduced at the

second trial. * * * Contra, *Starner v. Russell*, 35 LW 2706. * * *

"In order to prevent abuses, the fixed policy must necessarily be that the new sentence shall not exceed the old. Seldom will this policy result in inadequate punishment. Against the rare possibility of inadequacy, greater weight must be given to the danger inherent in a system permitting stiffer sentences on retrial — that the added punishment was in reaction to the defendant's temerity in attacking the original conviction. Even the appearance of improper motivation is a disservice to the administration of justice. * * *

"North Carolina strictly forbids an increase in a defendant's sentence after the trial court's term has expired and service of sentence has commenced. Thus the threat of heavier sentence falls solely on those who utilize the post-conviction procedures provided by the State. If the state wishes to institute a system permitting upward revision of sentences, it must proceed upon a rational basis in selecting the class of prisoners it will subject to this threat. It may not discriminate in this regard against those who have exercised the right to a fair trial. This is an arbitrary classification offensive to the Equal Protection Clause. * * *

The *Patton* case is peculiarly applicable here from a factual standpoint. In 1960 Patton, without the aid of counsel, entered a plea of *nolo contendere* to a charge of armed robbery and was sentenced to twenty years in prison by the North Carolina state court. In 1965 Patton sought post-conviction review, and on the basis of *Gideon v. Wainwright*, 372 U.S. 355 (1963) (as petitioner Rice did in the Circuit Court of Pike County in this case), obtained a new trial at which time Patton was found guilty of the same offense. The judge sentenced him to

twenty years, stating, "I would give you five more years than what I am giving you, but I am allowing you credit for the time that you have served." Patton applied to the United States District Court for the Western District of North Carolina for habeas corpus, claiming that the harsher sentence was a denial of due process and equal protection. The district court held that petitioner must be released unless properly sentenced and, further, that to impose a sentence equal to that given under a previous void conviction is either to deny credit for time served under the previous sentence or to impose a longer sentence. The district court further held that to deny Patton credit for the time he had served was a violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment, as is the imposition of a harsher sentence unless the record shows some justification for it. The Fourth Circuit, in reviewing this case, did not agree with that part of the district judge's reasoning to the effect that it was constitutionally permissible to impose a harsher sentence upon retrial if some justification is shown for it. On this point, the Fourth Circuit Court of Appeals stated:

"We are in accord with the First Circuit in *Marano v. United States*, 35 Law Week 280, which has recently held that a sentence may not be increased following a successful appeal even where additional testimony had been introduced at the second trial."

This Court does not believe that it is constitutionally impermissible to impose a harsher sentence upon retrial if there is recorded in the court record some legal justification for it.

"Where a heavier sentence is imposed [following a 'successful' appeal] the burden is upon the state to build a record to support the imposition of harsher punishment." *Galney v. Turner*, 266 F. Supp. 95, 103 (E. D. N. C. 1967) citing *Patton v. North Carolina*, 256 F. Supp. 225, 235 (W. D. N. C. 1966), *aff'd* _____ F. 2d _____ (4th Cir. 1967). See also *Marano*, *supra* at 585, where the First Circuit held that while it is impermissible to consider evidence of aggravating circumstances arising out of evidence of the crime it is nevertheless permissible to consider other facts made known to the sentencing court which would have a legitimate bearing on the imposition of sentence. "We do not

Here, the State of Alabama offers no evidence attempting to justify the increase in Rice's original sentences in cases Nos. 6427, 6428 and 6430 imposed on February 16, 1962 (which sentences totaled eight years to run consecutively), to a ten-year sentence in No. 6427, a ten-year sentence in No. 6428, and a five-year sentence in No. 6430, which sentences are also to run consecutively. It is shocking that the State of Alabama has not attempted to explain or justify the increase in Rice's punishment—in these three cases, over threefold.

The basic concept of due process makes it unfair for the State of Alabama to imprison Rice in February 1962, to offer him the right to post-conviction review⁴ to test and set aside constitutionally defective sentences, and then to subject him to greater punishment — three times greater than originally imposed — if he successfully exercises that right. Under the evidence in this case, the conclusion is inescapable that the State of Alabama in punishing petitioner Rice for his having exercised his post-conviction right of review and for having the original sentences declared unconstitutional.

An equally strong basis upon which the harsher sentences imposed by the Circuit Court of Pike County in these cases are unconstitutional is that they violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. *Patton v. North Carolina*, supra. In Ala-

think it inappropriate for the court to take subsequent events into consideration, both good and bad." *Shear v. Boles*, 268 F. Supp. 855 (N. D. W. Va. 1967), to the extent that it holds that in cases such as this the burden is on the person attacking the second harsher sentence to show that it was motivated by impermissible factors, is rejected.

Unless the reasons for the imposition of a harsher sentence affirmatively appear of record, it cannot be presumed that the motives which prompted the imposition of such a sentence are constitutionally permissible. Cf. *Carnley v. Cochran*, 369 U. S. 506, 82 S. Ct. 884, 8 L. Ed. 2d 70 (1962); *Johnson v. Zerbst*, 304 U. S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938).

⁴In Alabama, this review is by writ of error coram nobilis. See *Wiman v. Argo*, 408 F. 2d 674, 677-78 (5th Cir. 1962). This method of post-conviction review in lieu of habeas corpus is constitutionally permissible. *Taylor v. Alabama*, 355 U. S. 252, 261, 68 S. Ct. 1415, 92 L. Ed. 1935 (1948).

bama, there can be no increase in a sentence in a criminal case after the sentence is imposed. This is a protection that is given to all convicted criminals in this state. To deny such protection to convicted criminals who elect to exercise their post-conviction remedies and who do so successfully is unfair discrimination and does nothing except serve to limit the use of post-conviction proceedings in the Alabama state courts by prisoners. It denies the prisoner the protection of his original sentence as a condition to the right of appealing his conviction, or exercising his post-conviction remedies. Such a denial is constitutionally impermissible when the risk of a harsher sentence — as it is if the position of the State of Alabama is to be sustained — is borne exclusively by those who pursue their appellate rights of post-conviction remedy. Cf. *Smartt v. Avery*, 370 F. 2d 788 (6th Cir. 1967). It is basic to the theory of equal protection that the imposition of harsher treatment on prisoners solely because they successfully pursue available post-conviction remedies cannot possibly bear any rational connection with any legitimate state interest. In order to protect this constitutional right, the original sentence, which the state may no longer challenge of its own accord, must operate as a ceiling for any sentence subsequently imposed following the successful post-conviction proceeding and retrial of the accused for the same offense. This means that, in the absence of some showing of necessity or justification, the maximum sentence that could be constitutionally imposed upon petitioner Rice in state court case No. 6427 after his reconviction in December 1964, was four years and in case No. 6428, two years and in case No. 6430, two years. This Court, in the absence of some competent evidence, cannot accept the contention that the state makes in this case that case No. 6429 was nol-prossed in order to compensate petitioner for the time served on the illegal sentence imposed on February 16, 1962 in case No. 6427. On the contrary, when the illegal sentences were set aside in August 1964 — including the one entered in case No. 6429 — and the state was put to its proof, the nol-pros was entered for some reason other than a sympathetic one

toward Rice. In all probability, the answer lies in the circuit solicitor's affidavit that the state attached to its return and answer in this case, which indicates that the solicitor was "informed by the Sheriff that the owner of the service station involved in the charge in case number 6429 had left Alabama, and as I remember, resided in North Carolina." The imposition of sentences totalling three times greater than those originally imposed permits no other reasonable explanation as to the abandonment of the prosecution in case No. 6429.

In summary, the State of Alabama must give petitioner Rice credit for the time he served upon the illegal sentence imposed in February 1962 in state court case No. 6427. Additionally, the State of Alabama must give petitioner Rice credit for the time he has served to date on case No. 6427 imposed in December 1964. In this connection, Rice, as noted above, served 2 years, 6 months and 12 days on the sentence imposed in No. 6427 before that sentence was voided by the state circuit court. Since being resentenced in December 1964 in No. 6427, Rice has served an additional 1 year, 10 months and 26 days; and since being resentenced in No. 6427, he has earned 9 months and 26 days "good time." Thus, Rice has, as of August 31, 1967, actually served 4 years, 5 months and 8 days on the four-year sentence as originally imposed in No. 6427. If given credit for his "good time" — and this credit must be given — Rice has, as of August 31, 1967, served the equivalent of 5 years, 3 months and 4 days on this four-year sentence. Rice is entitled to be released immediately from any further incarceration by reason of the sentence imposed by the Circuit Court of Pike County in state court case No. 6427. Furthermore, Rice is entitled to have credited to the two-year sentences — the maximum constitutionally valid in Nos. 6428 and 6430 — the time served on No. 6427 that exceeds four years.

²To the extent that *Newman v. Rodriguez*, 375 F. 2d 712 (10th Cir. 1967), is, to the contrary, this Court declines to follow it for the reasons stated in *Hill v. Holman*, 255 F. Supp. 924 (M. D. Ala. 1966).

In accordance with the foregoing, it is the ORDER, JUDGMENT and DECREE of this Court that the petitioner, William S. Rice, is presently illegally incarcerated by the respondent, Curtis M. Simpson, Warden of Kilby Prison, by reason of the sentence imposed by the Circuit Court of Pike County, Alabama, in state court case No. 6427 in December 1964.

It is ORDERED that William S. Rice be discharged immediately from the custody of the State of Alabama and the custody of Curtis M. Simpson as Warden of Kilby Prison, Montgomery, Alabama, which custody is or may be pursuant to the conviction and judgment of the Circuit Court of Pike County, Alabama, in state court case No. 6427 rendered and imposed in December 1964.

It is further ORDERED that the costs incurred in this proceeding be and they are hereby taxed against the respondent, for which execution may issue.

Done, this the 26th day of September, 1967.

FRANK M. JOHNSON, JR.

United States District Judge

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1968

No. 418

CURTIS M. SIMPSON, Warden, Kilby Prison,
Montgomery, Alabama,

Petitioner,

vs.

WILLIAM S. RICE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OAKLEY MELTON, JR.
339 Washington Avenue
Montgomery, Alabama
Counsel for Respondent

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1968

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WILLIAM S. RICE,
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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit affirming the United States District Court for the Middle District of Alabama granting the petition for writ of habeas corpus is dated May 30, 1968, and is unreported to date. This opinion and the judgment thereon is printed in Appendix A and A-1 on pp. 12-14, of the Petition for Writ of Certiorari filed herein.

The opinion of the United States District Court for the Middle District of Alabama granting the respon-

dent's motion to file in forma pauperis his application for a writ of habeas corpus, dated July 17, 1967, is reported as *Rice v. Simpson*, 271 F. Supp. 267, and is printed as Appendix B on pp. 15-18 of the Petition for Writ of Certiorari and is on pp. 1-5 of the Record.

The opinion of the United States District Court for the Middle District of Alabama granting the writ of habeas corpus is dated September 26, 1967, is reported as *Rice v. Simpson*, 274 F. Supp. 116, and is printed as Appendix C of Petition, pp. 19-32 and is on pp. 57-73 of the Record.

JURISDICTION

Petitioner has sought to invoke this Court's jurisdiction under Title 28, United States Code, Section 1254 (1).

QUESTIONS PRESENTED

I

When illegal sentences are set aside on post-conviction review and Respondent is re-tried and convicted on the same charges, may the State of Alabama punish Respondent for having exercised his constitutional right of post-conviction review by increasing his original sentences three times greater than originally imposed?

II

When Respondent serves two years, six months, and twelve days on sentences thereafter declared to be void because of a State Court error, may the State of Alabama then re-try him for the same crimes and upon

conviction increase his sentences threefold, and also deny him any credit on such sentences for the time previously served?

STATEMENT

The Respondent, William S. Rice, upon his pleas of guilty in four Alabama State Court criminal cases, was sentenced to an aggregate of ten years in the State penitentiary. Thereafter, the judgment and sentences in each of said cases was set aside upon his application for a writ of error coram nobis and the proof offered in support thereof. The basis for such State Court's action was that Respondent was not represented by counsel on the first convictions as constitutionally required by *Gideon v. Wainwright*, 372 U. S. 335. Thereafter, he was retried in three cases and upon conviction in the same Circuit Court, before the same Circuit Judge, he was sentenced to a total of 25 years. The fourth case was not pressed because of the absence of a key witness. Respondent was the first State prisoner to file a writ of error coram nobis in the Circuit Court of Pike County, Alabama after the *Escobedo* and *Gideon* decisions.

With reference to the uncontroverted facts, the District Court found:

"Here, the State of Alabama offers no evidence attempting to justify the increase in Rice's original sentence.*** It is shocking that the State of Alabama has not attempted to explain or justify the increase in Rice's punishment—in these three cases, over threefold." (R. p. 69)

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"Under the evidence in this case, the conclusion is inescapable that the State of Alabama is punishing petitioner Rice for his having exercised his post-conviction right of review and for having the original sentences declared unconstitutional." (R. p. 70).

In concluding that under the facts of this case the State had violated the constitutional rights of the Respondent, the District Court below further held

"This court, after considerable study, has concluded that a sentence imposed by a court on retrial after post-conviction attack that is harsher than the sentence originally imposed—unless some justification appears therefor—violates the Due Process Clause of the Constitution of the United States." (R. p. 64).

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"This court does not believe that it is constitutionally impermissible to impose a harsher sentence upon retrial if there is recorded in the court record some legal justification for it." (R. p. 68).

In affirming the judgment of the District Judge on the basis of the District Judge's opinion, the Fifth Circuit Court of Appeals speaking through Judge Tuttle stated:

"It would be useless for us to add to the reasoning or conclusions announced by the Trial Court We, therefore, affirm the judgment of the Trial Court on the basis of Judge Johnson's opinion which is adopted as the opinion of this Court."

BRIEF AND ARGUMENT

The complete answer to the contentions of Petitioner is the clear and comprehensive opinion of the District Court which was adopted by the Fifth Circuit Court of Appeals. Such opinions completely refute every contention raised by Petitioner in this Court. Accordingly, we simply and respectfully refer your Honors to the opinion of the District Court, Appendix C of Petition, pp. 19-32, and Record pp. 57-73. The reading and study of such opinion should be sufficient for this Court to promptly deny the Petition for Writ of Certiorari filed herein.

QUESTION I

Petitioner has completely failed to set forth the main basis for the holding and opinion of the lower Courts, namely, that the Alabama State Court could not impose greater sentences on Respondent as punishment for his having exercised his constitutional right to and for having been successful in a post-conviction coram nobis proceeding. Petitioner ignores this main question and attempts to avoid the crucial issue by simply contending that the lower Courts erred in holding that the imposition of sentences upon Respondent on his second trials for the same offenses were unconstitutional. But Petitioner fails to set forth or disclose to this Court the reason for such opinions.

The matter of increased sentences upon retrial has been considered recently by several of the Federal District Courts and Circuit Courts of Appeal. In *Patton v. North Carolina*, 256 F. Supp. 225 (W. D. N. C. 1966), the District Court held that it would not be

constitutionally permissible to impose a harsher sentence upon retrial unless some justification was shown for it. The Fourth Circuit, in reviewing the case, did not agree that an increased sentence could be justified at all "even where additional testimony had been introduced at the second trial." *Patton v. North Carolina*, 381 F. 2d 636, (4 Cir. 1967). The First Circuit has held that a defendant's sentence could not be increased upon retrial, even where the trial judge stated the reason for the harsher sentence, unless the reason for the increase was based solely upon events subsequent to the first conviction. *Marano v. United States*, 374 F. 2d 583 (1 Cir. 1967).

Not only does the record in this case support the lower Court's opinions in the light of *Marano* and the two *Patton* decisions, Respondent submits that the evidence is sufficient to uphold the opinions even if the compelling logic of these decisions be ignored. Punishment cannot be imposed to penalize a defendant for exercising his right to pursue post-conviction remedies and to have an unconstitutional conviction set aside. *Short v. United States*, 344 F. 2d 550 (D. C. Cir. 1965). And that is exactly what the lower Courts found had occurred in this case.

The Fourth Circuit opinion in *Patton* and the opinion of the Courts below discuss in detail the several theories which support either the view that an increased sentence upon retrial is unconstitutional or the view that it is unconstitutional unless a legal justification therefor appears in the record. Briefly stated, such an increase may be said to offend basic concepts of due process, to constitute a denial of equal protection, and to violate the prohibition against double jeopardy.

To punish a prisoner for having exercised his post-conviction right of review is an obvious denial of due process. Less obvious, but no less unreasonable, is the conditioning of the right of post-conviction review upon an assumption of the risk of a more severe punishment should a constitutionally defective sentence be set aside, since the effect is to inhibit a person wrongfully tried by the State in the first instance from seeking a new trial.

Where, as in Alabama, there can be no increase in sentence after sentence is imposed, then it is a violation of the equal protection clause of the Fourteenth Amendment to deny that protection to that class of convicted criminals who elect to exercise post-conviction remedies. To do so is to unjustly discriminate against persons already denied a fair trial.

The courts below did not base their decisions upon double jeopardy grounds, although several courts have recently done so in spite of the half-century old case of *Stroud v. United States*, 251 U. S. 15, 40 Sup. Ct. 60, 64 L. Ed. 103 (1919).

The case of *Green v. United States*, 355 U. S. 184, 78 Sup. Ct. 221, 2 L. Ed. 2d 199 (1957), reversed a first degree murder conviction on retrial where the original conviction had been of second degree murder, the Supreme Court holding that the first jury had "impliedly acquitted" the prisoner of first degree murder. Several California courts have adopted the theory of *Green* and applied it in situations where, as in this case, longer sentences are involved but not different "degrees" of a crime. *People v. Ali*, 57 Cal. Rptr. 348, 424 P. 2d 932 (1967); *In re Ferguson*, 233

Cal. App. 2d 79, 43 Cal. Rptr. 325 (1965); *People v. Henderson*, 60 Cal. 2d 482, 35 Cal. Rptr. 77, 386 P. 2d 677 (1963). These courts take the position that the prisoner was "impliedly acquitted" of any longer sentence than he actually received at his first trial and upon retrial can receive no greater sentence than before, lest he be reprosecuted for an offense of which he has been acquitted.

The Fourth Circuit, however, took a different approach in *Patton* and pointed out that in *Stroud* the Supreme Court did not consider that aspect of double jeopardy which prohibits multiple punishment for the same offense and which therefore prohibits any increase in punishment following retrial. For a brief examination of this theory see the discussion of the District Court decision in *Patton* in 80 *Harv. L. Rev.* 891 (1967).

Petitioner argues that "a defendant, in obtaining a new trial, assumes the risk of a more severe sentence than was first imposed . . ." The idea that in pursuing a new and fair trial a defendant consents to the possibility—or likelihood—of harsher punishment if again convicted is a cruel fiction. The unfairness of this proposition becomes glaringly apparent when one considers that it was the State's initial failure to give him a fair trial which created the situation, yet it is the defendant who the State would have "assume the risk" of increased punishment with no credit for time served if he seeks what was denied him in the first instance.

It is not true that the judgment below reduced the statutory maximum sentence as to Respondent. The State agreed on the first conviction that its interests

would be served by a lesser sentence and that sentence itself fixed the constitutionally permissible maximum sentence as to Respondent, in the absence of any legal justification for a longer sentence. The judgment below does not foreclose the possibility of increased sentences on a defendant's second trial, although if conscientiously adhered to, it would help to foreclose any appearance of improper motivation if the sentence is increased.

The District Court heard the evidence, including testimony that Respondent was the first prisoner to file a writ of error coram nobis in the Circuit Court of Pike County, Alabama, after the *Escobedo* and *Gideon* decisions, and the court was shocked by the unreasonable and unexplained increases in the sentences upon retrial. Its conclusion that Respondent was denied due process and the equal protection of the law upon resentencing is logical and just.

QUESTION II

Petitioner further contends it was constitutionally permissible for the Circuit Court of Pike County, Alabama, to deny credit to Respondent, on sentences imposed by valid judgments, for time served under a prior void conviction for the same offenses.

At the time Respondent's original convictions were vacated as the result of coram nobis proceedings in the State Courts, he had been in prison for over two and one-half years. (R. p. 61). When resentenced after his second trials, Respondent was not given credit on his new sentences for the time previously served. (R. p. 61). The District Court, citing *Hill v. Holman*, 255

F. Supp. 924 (M. D. Ala. 1966), and *Patton v. North Carolina*, 381 F. 2d 636 (4 Cir. 1967), held Respondent "constitutionally entitled, upon being resentenced . . . to be given credit for each of the days he had served upon the voided sentence . . ." While the lower Court based its judgment on the rule of due process, the denial of credit for prior time served in the same case also violates the constitutional protection against double jeopardy in that it constitutes multiple punishment for the same offense. *Patton v. North Carolina*, 381 F. 2d 636 (4 Cir. 1967).

Petitioner attempts to distinguish the factual situation in *Hill v. Holman*, supra, from the circumstances surrounding Respondent's imprisonment. The State reasons that when one of Hill's several sentences was vacated, the time he had served on that sentence was applied to the valid sentences because they "existed during the period such time was served." However, the State says in this case, because *all* and not *some* of Respondent's sentences were vacated, then he is not entitled to receive credit for the time served when resentenced for the same offenses, because once the original sentences were vacated no valid judgment was then pending against him to which the time served could attach. Respondent submits that this reasoning is without rhyme or reason—unless it be administrative red tape. It ignores the simple but important fact that Respondent was resentenced for the identical offenses for which he was originally sentenced, and suggests that Respondent is urging that a prisoner be allowed to serve a sentence prior to his conviction. Respondent is not attempting to have past prison time apply to a sentence for a crime not committed at the time of his

original prosecutions, and the lower Courts did not hold that this would be proper. Respondent was tried and sentenced for committing certain offenses; he served at least a portion of the punishment imposed because of these offenses; and he was retried by the *same* Court and resented by the *same* judge for committing the *same* offenses. While the case of *Newman v. Rodriguez*, 375 F. 2d 712 (10 Cir. 1967) does hold that time served need not be credited against a new sentence, it does not discuss the artificial factual distinction attempted by Petitioner in its brief. Should Petitioner's reasoning be followed, a prisoner sentenced on a single offense and later retried and resented for the *same* offense could be compelled to serve more time under the two sentences than the maximum punishment provided by law. A single offense was involved in *Patton*, as in the cases of *Holland v. Boles*, 269 F. Supp. 221 (N. D. W. V. 1967) and *Gray v. Hocker*, 268 F. Supp. 1004 (D. Nev. 1967), which hold that credit must be given. In the latter case, the court said:

"While this Court does not subscribe to the penal philosophy that incarceration is a quid pro quo for the offense committed and is a debt the defendant owes society, the realities are that even if penitentiary confinement is deemed the best available means of rehabilitation and reformation, the earlier service under the void sentence would have been effective toward those ends. It is "a denial of fundamental fairness, shocking to the universal sense of justice" (*Betts v. Brady*, 1942, 316 U. S. 455, 62 S. Ct. 1252, 86 L. Ed. 1595), that a prisoner who has successfully voided the sentence then being served should be required to forfeit the months or even years of

such incarceration as a condition to the exercise of his legal rights. [268 F. Supp. at 1008]."

It seems noteworthy that the unreported Alabama Court of Appeal's decision in *Goolsby v. State*, 6th Div. 202, holds that the service of prior time is one of several items which must be considered by the trial court on resentencing upon second conviction, and the record must show that it was considered. In this case the record is silent as to any proper consideration of the prior time having been given.

The lower Courts also held that Respondent would be entitled to credit for "good time" earned during his several periods of incarceration, (R. pp. 63 & 72). *Short v. United States*, 344 F. 2d 550 (D. C. Cir. 1965); *Hill v. Holman*, 255 F. Supp. 924 (M. D. Ala. 1966); see also *Hoffman v. United States*, 244 F. 2d 378 (9 Cir. 1957); and *Youst v. United States*, 151 F. 2d 666 (5 Cir. 1945). Although the lower Court found that Respondent did not earn any "good time" while serving his first sentences, it went on to compute the "good time" earned since resentencing. (R. pp. 61 & 72). Petitioner does not now seem to object to the computations of the lower Court on the question of credit for good time and we accordingly assume that the State now concedes that such portion of the opinion of the lower Court was correct.

CONCLUSION

For the reasons outlined above, Respondent submits that the orders of the lower Courts are supported by both the law and the evidence and that the petition for certiorari should be denied.

Respectfully submitted,

Oakley Melton, Jr.

Oakley Melton, Jr.

Attorney for Respondent

I, Oakley Melton, Jr., Attorney for Respondent, and a member of the bar of this Court, hereby certify that I have mailed a copy of the foregoing Brief, postage prepaid, to the Honorable MacDonald Gallion, Attorney General of Alabama and to the Honorable Paul T. Gish, Jr., attorneys for Petitioner, at the Attorney General's Office, Montgomery, Alabama.

This 23 day of September, 1968.

Oakley Melton, Jr.

Attorney for Respondent

Office-Supreme Court, U.S.
FILED

DEC 13 1968

JOHN F. DAVIS, CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 413

CLIFTON A. PEARCE,

Respondent,

vs.

STATE OF NORTH CAROLINA,

R. L. TURNER, Warden,

Petitioners.

**Petition for a Writ of Certiorari to the United States
Court of Appeals for the Fourth Circuit**

AMICUS CURIAE BRIEF OF THE STATE OF KANSAS

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CLIFTON A. PEARCE,
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Petitioners.

**Petition for a Writ of Certiorari to the United States
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AMICUS CURIAE BRIEF OF THE STATE OF KANSAS

Amicus Curiae has an interest in this case insofar as it deals with the constitutionality of the action of a state criminal trial court imposing a greater sentence following conviction in a re-trial or in a resentencing procedure than was originally imposed. The Attorney General represents the State of Kansas as the chief law enforcement officer responsible for the administration of criminal justice and as such is interested in any decision limiting increased punishment on re-trial and resentencing.

ARGUMENT AND AUTHORITIES

Introduction

This case presents the recurring problem of the sentencing procedure that may constitutionally be employed following a second trial or sentencing procedure against a criminal defendant. The precise question involved is whether or not a state court can, within the bounds of the federal constitution, impose a greater sentence than was originally imposed upon a criminal defendant subsequent to the time the original sentence has been vacated or set aside. The Fourth Circuit Court of Appeals determined in this case that there was a Federal Constitutional limitation preventing the imposition of greater punishment in the second sentencing procedure on the authority of *Patton v. North Carolina*, 381 F.2d, 636 (4th Cir. 1967).

Respondent was sentenced to not less than twelve nor more than fifteen years in his original criminal trial. Following successful post-conviction relief, and a second jury conviction on the same charge, he was sentenced to a term of imprisonment that, taking into account time already served, amounted to a flat fifteen year sentence.

In Kansas, similar situations involving possible greater sentence at re-trial or resentencing that would be affected by a decision on the merits of the question presented herein arise in three separate ways: (1) greater punishment following the re-trial on an identical charge following successful direct appeal or post conviction relief initiated by the criminal defendant; (2) greater punishment imposed subsequent to a trial following post conviction relief setting aside a plea of guilty; and (3) greater punishment imposed during resentencing following a successful post conviction attack solely on the validity of the

sentence originally imposed. The increasing frequency with which such situations occur impels us to invite this Court's attention to problems with which we are faced which are significantly related to the problem of this case.

I. Greater Sentencing on Resentencing Is Allowed by a Majority of the Courts That Have Considered the Problem.

The latest compilation of state authority on the subject indicates a majority of the states would allow greater sentence on resentencing or re-trial. See, *Annotation, Propriety of Increased Punishment on New Trial for Same Offense*, 12 A.L.R. 3rd 978, 979-980. A survey of the latest federal authorities of which we are aware indicates a wide spectrum of decision ranging from complete prohibition of greater punishment on re-trial [*Pearce v. North Carolina*, F.2d (4th Cir. 1968); *Patton v. North Carolina*, *supra*] to conditional use of greater punishment in re-trial where justified by an evaluation of new resentencing or probation report [*United States v. White*, 382 F.2d 445, 448 (7th Cir. 1967)] or new resentencing report adding events subsequent to the original criminal trial as justification for an increased sentence [*Marano v. United States*, 374 F.2d 583, 585 (1st Cir. 1967)], to almost complete allowance of greater sentencing in the absence of clear and proven violations of constitutional standards [*United States ex rel. Starner v. Russell*, 378 F.2d 808, 811-812 (3rd Cir. 1967)]. It is the position of the State of Kansas that the latter view should control in situations like those described previously. In stating this position, we want to make it absolutely clear that we believe greater punishment on re-trial or resentencing is not constitutionally permissible, both by federal as well as state constitutions, where it is used to punish the criminal de-

fendant for successfully attacking a conviction. However, we are also fully convinced that a blanket prohibition upon greater punishment in resentencing is not only unjustified but would seriously impair the function of the state trial judge as a sentencing judge.

II. The Nature of the Sentencing Procedure Justifies Greater Sentencing on Resentencing.

It is significant that the phase of the criminal proceeding which is the subject of this lawsuit occurs after a determination of guilt has already been made, whether by trial or plea of guilty. At the time the state trial judge pronounces sentence, the presumption that a man is innocent until proven guilty has been dispelled by trial or admission. The constitutional rules, whose purposes are to create an atmosphere of fairness and equal opportunity to defend the presumption of innocence have all been utilized, if necessary. As a matter of fact, the cases in which the problem of resentencing or re-trial appears, attest to the successful employment of these very constitutional standards. But regardless of the reason for which resentencing is necessary, the fact remains that at the time the new sentence is pronounced there is no question but that the criminal defendant is guilty.

As a result, this Court, among many others has noted upon more than one occasion that the constitutional protections that exist until the time the presumption of innocence is rebutted by conviction and judgment, are relaxed for the purpose of imposing the proper punishment in each individual case. See e.g., *Williams v. Oklahoma*, 358 U.S. 576, 584 (1959); *Williams v. New York*, 337 U.S. 241, 248 (1949); *United States ex rel. Collins v. Claudy*, 204 F.2d 624, 628 (3rd Cir. 1953).

It was this distinction separating the sentencing portion of the criminal procedure from the guilt determining portion that has lent support to individualization of the sentencing procedure. Present penology theories support the proposition that each individual criminal defendant, subsequent to the time his guilt has been determined, should be punished as his individual case warrants.

"A sentencing judge, however, is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant—if not essential—to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics. And modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial.

"... The belief no longer prevails that every offense in a like legal category calls for identical punishment without regard to the past life and habits of a particular offender. This whole country has traveled far from the period in which the death sentence was automatic and commonplace result of convictions—even for offenses today deemed trivial."

* * *

"Modern changes in the treatment of offenders make it more necessary now than a century ago for observance of the distinctions in the evidential procedure in the trial and sentencing processes."

* * *

"The considerations we have set out admonish us against treating the due-process clause as a uniform

command that courts throughout the Nation abandon their age-old practice of seeking information from out-of-court sources to guide their judgment toward a more enlightened and just sentence In determining whether a defendant shall receive a one-year minimum or a twenty-year maximum sentence, we do not think the Federal Constitution restricts the view of the sentencing judge to the information received in open court. The due-process clause should not be treated as device for freezing the evidential procedure of sentencing in the mold of trial procedure. So to treat the due-process clause would hinder if not preclude all courts—state and federal—from making progressive efforts to improve the administration of criminal justice.” *Williams v. New York*, *supra*, pp. 248-249, 250.

The state or federal trial judge must, in discharging his duty to impose the proper sentence, consider all of the mitigating and aggravating circumstances involved in the crime. *Williams v. Oklahoma*, *supra*, at p. 586. Trial judges are counseled by both statutory authority and professional practice expertise to individualize their sentences. See *State Trial Judge's Book*, Chapter 20, Judgment and Sentencing in Criminal Cases, especially pages 236-244.¹

Historically, the subject of punishment, in criminal law is one that has been reserved for the legislative body, and for local or state administration. See *e.g.*, *Bell v. United States*, 349 U.S. 81, 82-83 (1955). The 14th Amendment was not designed to interfere with the power of the

1.—Although there is much concern about using the same criteria in each sentencing procedure, there is implicit in such an approach of individualized treatment for each criminal. See *e.g.*, Rubin, *Disparity and Equality of Sentences—A Constitutional Challenge*, 40 F.R.D. 55, 69-71; *Standards Relating to Sentencing Alternatives and Procedures*, 4, 10-12, 54, 252-256 (American Bar Association 1967); Levin, *Toward a More Enlightened Sentencing Procedure*, 45 Nebraska L. Rev. 499 (1966).

state to protect the lives, liberty and property of its citizens. *Hodgson v. Vermont*, 168 U.S. 262, 273 (1897).

Unless we are to change the foregoing philosophies it would appear, without more, that the result wrought by the *Patton* rule has deprived the sentencing procedure of that unique flexibility and individualization which has been so widely hailed as an important advancement in the administration of criminal justice. Certainly, it would be possible to establish a criminal procedure for sentencing that would allow no variation from individual to individual. If that were true there would be no problem presented by greater punishment at re-trial. However, we are not willing to concede that the heretofore thought wise decisions of those responsible for the administration of criminal justice establishing a flexible and individualistic system of enforcement, should suddenly be thrown to the wind by concluding, in effect, that such flexibility and individualism is precluded by the Federal Constitution in cases such as these. We reiterate, however, that the desired flexibility and individualization must not be a tool to penalize a successful criminal appellant or post conviction movant.

It is respectfully submitted that in any case involving resentencing the state trial judge should be free to exercise this flexibility and individualization of punishment even to the extent of imposing, where justified a greater sentence upon resentencing. See, *United States v. White*, 382 F.2d 445, 448 (7th Cir. 1967); *U. S. ex rel. Starnes v. Russell*, 378 F.2d 808, 811-812 (3rd Cir. 1967); *Marano v. United States*, 374 F.2d 583, 585 (1st Cir. 1967); *Short v. United States*, 344 F.2d 550, 552 (D.C. Cir. 1965). Cf. *Newman v. Rodriguez*, 375 F.2d 712, 714 (10th Cir. 1967) (holding that failure to credit time served on original sentence does not violate due process).

We certainly have more faith in the state trial judge than to attribute to him the motive of penalizing the successful criminal appellant or movant whenever a greater sentence on resentencing has been imposed.

Interestingly, in a related area, credit for time served prior to trial and/or prior to sentencing while awaiting the presentence report could be denied in the discretion of the federal trial judge in the absence of statutory direction. *Amato v. United States*, 374 F.2d 36, 36 (3rd Cir. 1967); *United States v. Deaton*, 204 F.2d 820 822 (6th Cir. 1967); *Williams v. United States*, 335 F.2d 290, 291 (D.C. Cir. 1967); *Epperson v. Anderson*, 326 F.2d 665 (D.C. Cir. 1963). The fact that the criminal defendant in such cases could, as a result of the discretionary sentencing orders of the judge, serve more time than was actually contained in the final sentence, was "not sufficiently invidious to reach constitutional proportions." *Sobell v. Attorney General of the United States*, 400 F.2d 986, 990 (3rd Cir. 1968). While the factual situation in these cases is not identical to that here, the practical result may be. And yet, in such situations, the denial of credit in the absence of statutory directives, is held to be a matter for the proper discretion of the sentencing judge.

The "proper" sentence should be imposed in each case, regardless of whether it is in an original trial and sentence, or re-trial and sentence, and should likewise be solely a matter for the proper discretion of the trial judge.

III. Analysis of the Theories Advanced to Prohibit Greater Sentencing on Resentencing.

Needless to say, if a greater sentence is absolutely prohibited by the Federal Constitution, the foregoing remarks are of no import. However, we feel that an analysis of the justifications supporting the conclusion that

greater punishment is constitutionally impermissible leaves a great deal of doubt about their validity. We therefore consider the three constitutional objections to greater punishment on re-trial, (a) double jeopardy, (b) due process and (c) equal protection.

(a) Double Jeopardy.

It is suggested that the double jeopardy prohibition of the Fifth Amendment, if extended through the Fourteenth Amendment to the states—a conclusion not currently valid²—prohibits “multiple punishment.” *Patton v. North Carolina*, *supra*, 643-646. We think it clear that greater punishment on re-trial is not prohibited by the double jeopardy clause. Obviously, fact situations such as the instant case do not present double jeopardy claims for reprosecution for the same offense following acquittal, reprosecution for the same offense following conviction, or reprosecution for a greater offense following conviction of a lesser included offense (the so-called implied acquittal doctrine of *Green v. United States*, *supra*, note 2).

As this Court has noted on several prior occasions, the constitutional prohibition against double jeopardy was designed to protect the individual from “being subjected to the hazards of trial and possible conviction more than once for an alleged offense.” *Green v. United States*, *supra*, at p. 187.

In any event, as long as the sentence ultimately imposed upon the criminal defendant is not in excess of the

2. Even though double jeopardy supports the doctrine of implied acquittal based upon conviction of a lesser included offense, *Green v. United States*, 355 U.S. 184, 193-194, 198 (1957), the federal rule is not applicable to the states through the Fourteenth Amendment. See, *Palko v. Connecticut*, 302 U.S. 319 (1937).

statutory maximum, that criminal defendant has not been subject to multiple punishment by greater sentence and re-trial. Certainly, the fact that the criminal defendant was on two occasions sentenced does not in itself mean he was subject to multiple punishment. If it did, there would be no problem presented by this case; re-trial or resentencing would be completely prohibited. Multiple punishment must mean punished more than once for the same offense. Until the time that a criminal defendant has been validly sentenced, he has not, in the first instance, been punished. A later sentence, even if it is greater, as long as it is within the statutory maximum, can therefore by definition not be multiple punishment.

Concerning trials, it is clear that reprosecution of an offense resulting in conviction which is subsequently set aside does not violate double jeopardy. *United States v. Tateo*, 377 U.S. 463, 465 (1964); *United States v. Ewell*, 383 U.S. 116, 121 (1966); *Foreman v. United States*, 361 U.S. 416, 425 (1960); *Trono v. United States*, 199 U.S. 521, 531, 533 (1905); *United States v. Ball*, 163 U.S. 662, 672 (1896). Further, upon re-trial the prosecution is not limited solely to re-presenting the evidence presented at the first trial. *United States v. Shotwell Manufacturing Co.*, 355 U.S. 233, 243 (1957).

The reason for these rules is well expressed in *United States v. Tateo*, *supra*.

"Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. From the standpoint of a defendant, it is at

least doubtful that appellate courts would be as zealous as they are now in protecting against the effects of improprieties at the trial or pre-trial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution. In reality, therefore, the practice of re-trial serves defendants' rights as well as society's interest. The underlying purpose of permitting re-trial is as much furthered by application of the rule to this case as it has been in cases previously decided." l.c. 466.

Society has a similar interest in imposing the "proper" sentence upon each guilty criminal defendant. Prohibition of greater sentence upon re-trial resentencing would contradict that interest.

(b) Due Process.

A second constitutional objection to greater sentence in re-trial and resentencing is that imposition of the greater sentence violates the due process requirements of either the Fifth or Fourteenth Amendments. See *Patton v. North Carolina*, *supra*, pp. 638-641.

The limitation that is placed upon the power of the states to prescribe penalties for violations of their laws is not precisely definable, but has always allowed the states wide latitude of discretion. Their enactments transcend this limitation only where the penalty prescribed is so severe and oppressive as to be wholly disproportionate to the offense and obviously unreasonable. *St. Louis I. M. S. R. Co. v. Williams*, 251 U.S. 63, 66-67 (1919). The Fourteenth Amendment does not limit the powers of a state in dealing with a crime committed within its borders or with a punishment regarding that crime as long as fair and impartial justice under the law is granted to the criminal defendant. *Ughbanks v. Armstrong*, 208 U.S.

481, 487 (1908). The state, for example, may legitimately within the confines of the due process clause provide for more severe penalties for repeating offenders [*Oyler v. Boles*, 368 U.S. 448, 452 (1962); *Graham v. West Virginia*, 224 U.S. 616 (1912)], and may allow an indeterminate sentencing procedure granting executive officers a deciding voice in the ultimate sentence imposed upon any criminal defendant [*Dreyer v. Illinois*, 187 U.S. 71, 84 (1902)].

What is due process? Without resorting to linguistic jousting, due process means fair play and substantial justice. Can it be said that the criminal defendant who has been afforded more than one opportunity to defend upon the charge of which he is accused, who is provided innumerable remedies for any alleged impropriety in the verdict of guilty or imposition of sentence, who can attack both the conviction and the sentence in both state and federal courts, who receives technical assistance of a lawyer absent express waiver in each of these proceedings and who, at least in a re-trial has been found guilty not once but at least twice and perhaps more, has been treated unfairly because, as is the case in Kansas [See K.S.A. 62-1601, 1602; *State v. McCord*, 8 Kan. 232, 242-244 (1871)] at each of his re-trials or resentencing procedures, the entire relevant proceeding commences anew, including the possibility that the sentence will be greater, if justified? Is such a criminal defendant, who is sentenced to greater punishment after the second or subsequent re-trial, after being given the opportunities required by due process, suddenly treated unfairly solely because of the greater punishment, if the greater punishment is justified under normal sentencing procedures?

An example occurring recently in Kansas we think illustrates the soundness of a negative answer to the previous questions. A criminal defendant pled guilty to a forgery charge in the Kansas state court, and upon introduction of proper evidence, was sentenced under the Kansas Habitual Criminal Act, K.S.A. 21-107 (a), as a third felony offender. The Kansas statute provides a minimum sentence of fifteen years and a maximum sentence of life imprisonment for third felony offenders. The Kansas trial judge sentenced this criminal defendant to the minimum term of fifteen years. In a federal habeas corpus proceeding, the defendant attacked only one of the prior convictions as being invalid. He did not attack the validity of his guilty plea. After hearing, the federal court sustained his position that the one prior conviction was invalid. Kansas procedure provides that if a portion of a sentence is void, the remainder of the sentence is valid and the prisoner may be resentenced. *State v. Fountaine*, 199 Kan. 434, 436-7, 430 P.2d 234 (1967); *State v. Bridges*, 197 Kan. 704, 706, 421 P.2d 45 (1966). Pursuant to normal procedure, the defendant was remanded to the custody of the state with an order that he be resentenced by the state trial court properly, or if that were not done, that he be released. See *Wynn v. Page*, 369 F.2d 930, 933 (10th Cir. 1966). In this particular case, the defendant will be returned to the state court, will be sentenced on his original plea of guilty with the enhancement of penalty provided by the other, unattacked, and still valid prior felony conviction. The defendant will be sentenced as a second felony offender under the Kansas recidivist statute which provides a minimum sentence of double the sentence of the principal charge. The Kansas court has no discretion in the imposition of this minimum sentence. *State v. Tague*, 188 Kan. 462, 466, 363 P.2d 454 (1961).

In this particular case, the imposition of the minimum second felony sentence will be ten to twenty years, a sentence that is greater than the fifteen year sentence originally imposed under the third felony offender provision of the recidivist statute. We have a situation where a mandatory resentence greater than the original sentence will be imposed. There will be no discretion involved on the part of the sentencing judge, and there will be no possibility that the greater sentence can be called punishment for success. Has this defendant been denied due process? He received exactly the same treatment in the second sentencing procedure that every other defendant sentenced as a second felony offender would receive. He has received the opportunity to, with the assistance of counsel, have the original charge tried to a jury. He has had an opportunity procedurally to require the state to procedurally prove the existence of the prior felony conviction upon which he will now be sentenced. He has had an opportunity to attack his entire criminal proceeding in both the state and federal courts. He has been successful, in part, in the federal court in having one prior conviction declared void for constitutional reasons. And yet, he will be sentenced to a greater period of time than he was originally. The only alternative to prevent greater punishment in this particular case is to treat the defendant extra-specially or extra fairly. There is no requirement of the federal constitution that this be done.

If the defendant receives the benefit of a maximum limitation on his sentence, then the state should receive the benefit of the minimum limitation on the sentence. This result requires the conclusion that the sentence imposed will be the only sentence that can be imposed anytime concerning this particular criminal defendant and his charge. Few, including the defendant, would disagree

with the proposition that upon resentencing the court might want to take into account new factors indicating that a reduction in the sentence were permissible. And, of course, the criminal defendant recognizes the possibility that the sentence may be less when he pursues appeal or post-conviction remedies. It would seem that treating the parties fairly would require the same standard of limitation applying to both, as opposed to the limitation on one side of the coin only.

(c) Equal Protection.

Those who support the absolute prohibition against greater sentencing on re-trial or resentencing contend that it violates the equal protection clause of the Fourteenth Amendment. See *Patton v. North Carolina*, *supra*, pp. 641-643. What does equal protection mean? It simply means that everyone should be treated alike by the law unless there is some reasonable classification established requiring different treatment. A class described by race, right handedness, indigence, or some other factor equally irrelevant to the penalty, if there is one, is such an arbitrary classification. The true test of equal protection is whether or not all defendants in a particular class, such as habitual criminals, as well as those who are retired or resentenced, are subject to the same procedure. There is no contention that in this case, or in the normal re-trial or resentencing case, that is not true. Further, greater sentence on resentencing if not accomplished for punitive purposes but for the purpose of imposing a "proper" sentence, bears a reasonable relationship to the fair administration of criminal justice. It is difficult, therefore, to see how such a classification concerning criminal defendants who appeal or attack their convictions, can be classified as arbitrary or unreasonable.

The proponents of the limitation on greater resentencing argue that since those criminals who do not attack their convictions do not face possibility of greater sentence by virtue of state statutes prohibiting sentence increase after incarceration, to deprive the attacking criminals of this statutory prohibition violates equal protection. Of course, interpretation of the respective state statutes is in the first instance a matter of state law. But, conclusion loses much of its vitality when we realize that implicit in the state statute is the requirement that the conviction to which it applies is the *valid conviction*. An invalid conviction is regarded as void or never validly existing. How can a state statute such as this apply to an invalid sentence?

We believe a much more sound equal protection argument supports allowance of greater sentence on resentencing. Either by statutory prescription or practice a set of criteria are used by a state trial judge wherever he imposes sentence. The criteria for proper sentencing are used in each case, including resentences. If this normal procedure is not followed in resentencing some will not receive equal treatment. They will be given the advantage of a special set of criteria upon which sentence will be imposed. This is not equal protection.

Referring to the Kansas example noted previously, the criminal defendant in that case was treated absolutely equally with all other criminal defendants who are sentenced under the second felony recidivist provision of the statute. As a matter of fact, he was treated *exactly the same*. Is this a denial of equal protection?

Equality could mean every criminal defendant would receive exactly the same sentence. Each criminal defendant would be *equally protected* if everyone convicted of felony were executed. There is more to equal protection than mere equal treatment in every single case.

Viewing the equal protection argument propounded in *Patton* in a different light, we again note its infirmities. A criminal inmate in Kansas cannot have his sentence reduced solely on the initiative of the trial court more than four months following its imposition. K.S.A. 62-2239. If equal protection requires establishment of a maximum sentence—the first sentence imposed—on the ground that otherwise the criminal would be denied equal application of the state statute prohibiting sentence increases on valid sentences, like reasoning would make the first sentence the minimum sentence on resentencing because to do otherwise would deny equal application of the prohibition against court reduction of valid sentences under statutes like K.S.A. 62-2239. If the criminal on resentence can claim the benefit of sentence reduction, he should be subject to a greater sentence where proper. The true question in every case is not whether the sentence is high, low, greater, or lower, but whether it is justified.

This Court's language in *Palko v. Connecticut*, *supra*, concerning a different subject, is appropriate at this point.

"A reciprocal privilege [that of allowing the state to appeal the judgment of acquittal, obtain reversal, and thereafter retry the criminal defendant], subject at all times to the discretion of the presiding judge . . . has now been granted the state. There is here no seismic innovation. The edifice of justice stands, in its symmetry, to many, greater than before." *l.c.* 328.

IV. Special Situations Illustrating Why the Rule Allowing Greater Sentencing on Resentencing Is Proper.

The case presently before the Court concerns specifically the situation involving a subsequent jury trial and punishment following a second conviction of guilt on the same charge. Because the blanket rule prohibiting

greater sentence on any resentencing affects other situations in which the defendant is resentedenced arising in different procedures, we invite consideration of several problems that have faced, and will continue to face the state prosecutor and judge in relation to the greater sentencing problem.

If the criminal defendant has pled guilty to a crime, or has through the use of "plea-bargaining" secured the advantage of reduction of charges, or agreement not to proceed under the habitual criminal act, he has created a situation where either implicitly or explicitly he believes, and it is commonly the case, that his sentence will not be as great as it might have been otherwise, assuming there is any judicial discretion involved. If there were a blanket prohibition against greater punishment on resentencing, it is obvious that the intelligent criminal defendant, or experienced criminal defendant, might be able to have his cake and eat it too. The defendant would enter a plea of guilty in the hopes that the sentence would be not as great as it could be under the statute, or that some other action alleviating the seriousness of the charge be taken by the prosecution. If subsequently, with the lighter sentence in existence, the criminal defendant were able to have the plea of guilty set aside and force a trial on the merits of the original cause, and at the same time retain the benefits of his bargaining with the prosecution or the benefits of the plea of guilty, the result surely would not be fair to the state.

Or, assume a situation where a criminal defendant is convicted or pleads guilty to more than one count of the indictment and is sentenced on each charge, the sentences to run concurrently. Assume further that the criminal defendant has a long record of past confrontations with the law, including numerous felony convictions, and that

therefore, because the greater sentence is asked for, and deserved in view of the trial judge, that defendant is sentenced under a recidivist statute. Because of the significant changes that have occurred in the past five years in the administration of criminal justice many state prosecutors who were doing what was constitutionally permissible several years ago are finding, after the fact, that although the action they took was proper at the time it was taken, it has now become improper. This has created sentencing problems. The most common example is that involving the right to counsel. The requirement that each criminal defendant either have retained or appointed counsel or expressly waive that right exists today [*Gideon v. Wainwright*, 372 U.S. 335, 345 (1963)] and when pronounced had the effect of invalidating a number of convictions obtained prior to its pronouncement which were proper until that time [see *Betts v. Brady*, 316 U.S. 455, 473 (1942)]. In our example, let us assume that the criminal defendant is properly able to attack successfully a prior conviction used in enhancing his sentence. He is then remanded to the custody of state officials for resentencing without the use of the prior invalid felony convictions. If there had been no prior convictions in the first instance, and the defendant had merited more punishment than mere concurrent terms, the trial judge could have sentenced him to consecutive terms. The criminal defendant in our example would have deserved, and still deserves, such punishment under present punishment theories. Yet, because of a blanket prohibition against greater punishment and resentencing, the trial judge would be precluded from resentencing the defendant to consecutive terms if that sentence were slightly greater than the term imposed under the recidivist statute, even though the consecutive sentences were completely justified in this particular criminal defendant's case. Certainly, the in-

terest of society in adequately punishing those who break the law, and in protecting its citizens, has not been served by such a limitation.

There are other such examples, but we will not prolong this argument by enumerating each. We believe these few illustrate why greater sentencing on resentencing should be permitted.

CONCLUSION

The sentencing procedure, unlike the procedure involved in determining guilt, has traditionally been considered differently through the eyes of constitutional propriety. Modern theories of sentencing punishment procedure which emphasize the individualness of each case and the flexibility in designing a punishment for each specific case based on the facts of that case, require, we believe, the conclusion that greater punishment upon re-trial or resentencing is not *per se* improper. Conceding that greater sentencing on re-trial or resentencing is improper when utilized solely for punitive purposes, we believe that just as the criminal defendant may receive the benefit of his individualized attention for punishment purposes allowing a reduction of the sentence, he should suffer, if it is justified, the burden of greater sentencing where "proper." Only in such a situation will the sword of justice indeed be two-edged.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1968

No. 413

**STATE OF NORTH CAROLINA,
WARDEN R. L. TURNER,**

Petitioners,

vs.

CLIFTON A. PEARCE,

Respondent.

**On Writ of Certiorari to the United States Court of
Appeals for the Fourth Circuit**

BRIEF FOR PETITIONERS,

**Joined In and Adopted by the States of Alabama, Delaware, Ken-
tucky, Louisiana, Maine, Mississippi, Montana, Nebraska, Penn-
sylvania, Rhode Island, South Carolina, Tennessee, Texas, Wis-
consin, Wyoming, and The Territory of Guam, Appearing as Amici
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No. 413

STATE OF NORTH CAROLINA,
WARDEN R. L. TURNER,
Petitioners,
vs.
CLIFTON A. PEARCE,
Respondent.

On Writ of Certiorari to the United States Court of
Appeals for the Fourth Circuit

BRIEF FOR THE PETITIONERS

CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (Appendix 15-16) is reported as CLIFTON A. PEARCE v. STATE OF NORTH CAROLINA, WARDEN R. L. TURNER, 397 F. 2d 253 (4th Cir. 1968).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S. Code, Section 1254(1). The petition for a writ of certiorari was granted on October 28, 1968.

QUESTION PRESENTED

MAY DEFENDANT BE SENTENCED TO A LONGER TERM OF IMPRISONMENT AT A SECOND TRIAL THAN HE RECEIVED AT HIS FIRST TRIAL AFTER THE FIRST TRIAL HAD BEEN VACATED ON APPEAL?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides as follows:
Section 1.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Fifth Amendment to the Constitution of the United States provides as follows:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation."

STATEMENT OF THE CASE

Clifton A. Pearce was initially tried at the May 1961 Term of the Superior Court of Durham County, North Carolina, on a charge of rape. Upon arraignment the prosecuting attorney elected to try Pearce for the offense of assault with intent to commit rape. A verdict of guilty of assault with intent to commit rape was returned by the jury. Pearce was sentenced to a term of imprisonment of not less than twelve nor more than fifteen years.¹

¹ Pearce began serving this twelve to fifteen years sentence on May 26, 1961. The approximate expiration date of this sentence, assuming that Pearce would have received all allowances of time for good behavior, was November 13, 1969.

In 1965 Pearce applied for and obtained a Post Conviction review and on May 10, 1965, W. J. Johnson, Judge Presiding at the May 1965 Criminal Session of Durham Superior Court, entered an Order denying relief. The Supreme Court of North Carolina granted Certiorari to review Judge Johnson's Order and awarded Pearce a new trial "upon the ground that the trial court committed error in admitting, over defendant's objection, (his) confession" This case is reported in 266 N.C. 234, 145 S.E. 2d 918 (1966).

A new Bill of Indictment charging assault with intent to commit rape was returned against Pearce by the Grand Jury at the March 1966 Session of the Durham Superior Court. Pearce was tried at the June 6, 1966 Two-Week Criminal Conflict Session, Durham Superior Court. The jury returned a verdict of guilty as charged and a prison sentence of eight years was imposed.² Pearce appealed to the Supreme Court of North Carolina which affirmed the conviction. 268 N. C. 707, 151 S.E. 2d 571 (1966).

In March 1967, Pearce applied to the United States District Court for the Eastern District of North Carolina for a Writ of Habeas Corpus. In July 1967 Pearce filed a "Motion to Amend Petition for Writ of Habeas Corpus." On November 20, 1967, the District Court entered an Order voiding Pearce's second sentence under the decision of *PATTON v. STATE OF NORTH CAROLINA*, 381 F. 2d 636 (4th Cir. 1967); cert. den. 390 U.S. 905 (1967). The Order further directed that the State of North Carolina "proceed to re-sentence said Clifton A. Pearce within sixty days from the date of service of this Order" and if the State of North Carolina does not so elect, "this Court will entertain a motion on behalf of the petitioner for an order releasing him from all restraint imposed by virtue of the sentence of eight years imprisonment imposed at the June 1966 Session of the Superior Court of Durham County upon his conviction of assault with intent to commit rape." Appendix 4-6.

On November 30, 1967, James H. Pou Bailey, a Judge of

² Pearce began serving this sentence on February 6, 1967. The approximate expiration date of this sentence, assuming Pearce would have received all allowances of time for good behavior, was October 10, 1972.

the Superior Court of North Carolina and Judge Presiding at the November 1967 Term of the Superior Court of Durham County, entered an Order electing not to re-sentence Pearce. Appendix 7-11.

On February 1, 1968, the United States District Court for the Eastern District of North Carolina entered a Writ of Habeas Corpus ordering Pearce's immediate release "from all restraint imposed by virtue of the sentence of eight years imprisonment imposed at the June 1966 Session of the Superior Court of Durham County, North Carolina, upon his conviction of assault with intent to commit rape." Appen. 12-14.

The State of North Carolina and Warden R. L. Turner appealed the District Court's decision to the Fourth Circuit Court of Appeals. The Circuit Court, on June 19, 1968, in a Memorandum Decision based upon *PATTON v. STATE OF NORTH CAROLINA*, 381 F. 2d 636 (4th Cir. 1967), affirmed the District Court's ruling.

ARGUMENT

MAY DEFENDANT BE SENTENCED TO A LONGER TERM OF IMPRISONMENT AT A SECOND TRIAL THAN HE RECEIVED AT HIS FIRST TRIAL AFTER THE FIRST TRIAL HAD BEEN VACATED ON APPEAL?

The Supreme Court of North Carolina has previously answered the single question presented and established the following rules: "When, upon defendant's application, a sentence is set aside and a new trial ordered, the whole case is tried de novo. The former judgment, therefore, does not fix the maximum punishment which may be imposed after a second conviction. *STATE v. PEARCE*, 268 N.C. 707, 151 S. E. 2d 571; *STATE v. SLADE*, 264 N. C. 70, 140 S.E. 2d 723; *STATE v. MERRITT*, 264 N.C. 716, 142 S.E. 2d 687; *STATE v. WHITE*, 262 N.C. 52, 136 S.E. 2d 205, *cert. denied*, 379 U.S. 1005 (1965). The total of the time served under the two sentences, however, may not exceed the maximum sentence authorized by the applicable statute. *STATE v. FOSTER*, 271 N.C. 727, 157 S.E. 2d 542; *WILLIAMS v. STATE*, 269 N.C. 301, 152 S.E. 2d 111; *STATE v. WEAVER*, 264 N.C. 681, 142 S.E. 2d 633; *STATE v. SLADE*, *supra*.

Furthermore, on *any* subsequent sentence imposed for the same conduct, a defendant must be given full credit for all time served under the previous sentence. *STATE v. PAIGE*, 272 N.C. 417, 158 S.E. 2d 522; *STATE v. WEAVER, supra.* *STATE v. STAFFORD*, No. 495, Fall Term 1968, Supreme Court of North Carolina, December 9, 1968, 274 N.C. ----, ---- S.E. 2d ---- (1968).

The rule followed in North Carolina that a defendant once convicted may, upon that conviction and sentence being reversed, be subjected to a more severe sentence upon a new trial for the same offense is the prevailing rule of the state courts which have been faced with the issue. *REEVES v. STATE*, 3 Md. App. 195, 238 A. 2d 307 (1968); *STATE v. YOUNG*, 200 Kan. 20, 434 P. 2d 820 (1967); *MOON v. STATE*, 1 Md. App. 569, 232 A. 2d 277 (1967); *SALISBURY v. GRIMES*, 223 Ga. 776, 158 S.E. 2d 412 (1967); *STATE v. SQUIRES*, S.C., 149 S.E. 2d 601 (1966); *MORGAN v. COX*, 75 N.M. 472, 406 P. 2d 347 (1965); *HOBBS v. STATE*, 231 Md. 533, 191 A. 2d 238 (1963), cert. den. 375 U.S. 914 (1963); *HICKS v. COMMONWEALTH*, 345 Mass. 89, 185 N.E. 2d 739 (1962), cert. den. 374 U.S. 839 (1962); *SANDERS v. STATE*, 239 Miss. 874, 125 So. 2d 923, 85 A.L.R. 2d 481 (1961); *TILGHMAN v. CULVER*, Fla., 99 So. 2d 282 (1957), cert. den. 356 U.S. 953 (1958); *BOHANNON v. DISTRICT OF COLUMBIA*, Mun. Ct. of Appeals of the District of Columbia, 99 A. 2d 647 (1953); *COMMONWEALTH EX REL. WALLACE v. BURKE*, 169 Pa. Super. 633, 84 A. 2d 254 (1951); *COMMONWEALTH v. ALESSIO*, 313 Pa. 537, 169 A. 764 (1934); *STATE v. KNEESKERY*, 203 Iowa 929, 210 N.W. 465 (1926); *STATE v. MORGAN*, 145 La. 585, 82 So. 711 (1919); *MANN v. STATE*, 23 Fla. 610, 3 So. 207 (1887). Accord, 21 AM. JUR. 2d, CRIMINAL LAW, §570; 39 AM. JUR. NEW TRIAL, §217; 24 C.J.S., CRIMINAL LAW, §1426; 66 C.J.S. NEW TRIAL, §226; Anno: "Propriety of Increased Punishment on New Trial For Same Offense," 12 A.L.R. 3rd 978 (1967). Contra, *PEOPLE v. HENDERSON*, 60 Cal. 2d 482, 35 Cal. Rptr. 77, 386 P. 2d 677 (1963); *STATE v. WOLF*, 46 N.J. 301, 216 A. 2d 586, 12 A.L.R. 3rd 970 (1966); *STATE v. TURNER*, Or., 429 P. 2d 565 (1967).

In *HOBBS v. STATE*, *supra*, the defendant in 1947 pleaded guilty to three charges of armed robbery and was sentenced to twenty years on each charge, the sentences to run concurrently. In 1962, as a result of a Habeas Corpus petition filed in the United States District Court, the State conceding that the defendant was not represented by counsel at his first trial; a new trial was awarded. In October, 1962, after having had counsel appointed to represent him, the defendant pleaded not guilty to the three indictments of armed robbery. He was found guilty by the jury on two of the three indictments and sentenced to twenty years in one case and five years in the other, the sentences to run consecutively from the date of his original sentence. This amounted to five years more than his previous sentence. In affirming the longer sentence the highest appellate court in Maryland said, "(i)n asking for and receiving a new trial, appellant must accept the hazards as well as the benefits resulting therefrom." 191 A. 2d at 240. The Court further stated, "(o)n a trial de novo the Court hears the case as if it were being tried for the first time and considers the entire matters of verdict, judgment and sentence as if there had been no prior trial." *Id.* at 240.

In *REEVES v. STATE*, *supra*, the Maryland Court of Special Appeals very recently reaffirmed the position taken by the Court of Appeals in *HOBBS*, i. e., "that the imposition of a sentence at the second trial which results in a greater period of confinement than called for in the sentence imposed at the first trial is not unlawful." 238 A. 2d at 312. The Court made it quite clear, however, that the time served by a defendant under a conviction later voided and the time imposed upon retrial together could not exceed the statutory maximum allowed for the crime. The position taken by Maryland is in accord with the North Carolina view. *STATE v. WEAVER*, 264 N.C. 681, 142 S.E. 2d 633 (1965)

In *BOHANNON v. DISTRICT OF COLUMBIA*, *supra*, defendant was convicted of failing to yield the right-of-way after stopping at a stop sign and sentenced to pay a fine of \$10.00 or in default thereof to serve ten days. Upon motion

by the defendant a new trial was granted. He was again found guilty and sentenced to pay a fine of \$100.00, or in lieu thereof, a thirty day term of imprisonment. The Municipal Court of Appeals for the District of Columbia, after noting that the judgment was within statutory limits, said: "We readily appreciate appellant feeling that the obtaining of a new trial after the first conviction was a hollow victory, since it resulted in a second conviction and fine ten times as much as the one first imposed. This, however, was a risk he took and the second judge was not bound to impose the same fine given by the first judge." 99 A. 2d at 648.

In *SALISBURY v. GRIMES*, *supra*, the defendant was tried and convicted (the offense is not specified in the opinion) and sentenced to ten years imprisonment. The defendant's request for a new trial was granted. Upon retrial the defendant was again convicted (we assume for the same crime) and sentenced to a term of imprisonment of thirteen years. The defendant filed a petition for a writ of habeas corpus in the Superior Court of Fulton County contending, among others, that the imposition of a harsher sentence following a successful appeal violated the equal protection clause of the Fourteenth Amendment. The Superior Court dismissed the petition and the defendant appealed. In affirming the lower court's dismissal, the Supreme Court of Georgia stated:

"Appellant twice moved for a new trial and such requests for new trial were granted on his own motion. When appellant was granted a new trial, it wiped the slate clean as if no previous conviction and sentence had existed. In electing to have his case retried, appellant must have contemplated the possibility of having the jury impose a harsher sentence if he were convicted again. (Citations omitted). Yet, appellant did seek a new trial, and the jury carried out its duty by prescribing his sentence." 158 S.E. 2d at 414.

In *STATE v. JACQUES*, 99 N.J. Super 230, 239 A. 2d 252 (1968), defendant was tried and convicted in 1966 in a two-count indictment charging robbery and being armed in the perpetuation of the robbery. He was sentenced to three to

five years for the robbery and two years for being armed, the latter sentence to run consecutively with the first. On appeal to the Superior Court, the conviction was reversed. The defendant was again tried upon the same charges, found guilty and sentenced to a term of six to eight years for the robbery and a consecutive term of one to two years on the charge of being armed. The defendant appealed to the Superior Court contending that the sentences imposed upon retrial be modified so as not to exceed the sentences imposed upon the initial trial. The Superior Court refused to modify the sentences imposed. In so holding, the Court noted, 239 A. 2d at 258:

"At oral argument counsel agreed that the probation reports which were available to the first and second sentencing trial judges be submitted and considered by the court. This has been done. The probation reports disclose among other things that subsequent to the first sentencing defendant was under charges of breaking, entering and larceny and armed robbery in Middlesex County. The record shows that on May 11, 1967 he was convicted by a jury for the crime of breaking and entering with intent to steal. On May 24, 1967 defendant was convicted of armed robbery. He was sentenced on August 21, 1967.

"On June 9, 1967, when defendant was sentenced on the armed robbery charge in Union County, Judge Barger was aware that defendant was to be sentenced in Middlesex County for the crimes of which he was found guilty. He was given full credit for time spent in official confinement. The presentence reports and transcript of sentence proceedings disclose a background of defendant's lawlessness. Undoubtedly the experienced trial judge considered the convictions in Middlesex County in light of the defendant's criminal background and determined that the public safety and welfare required the new sentences."

And, as the Court concluded:

"Our holding here relates solely to the factual situation

presented. We have examined the record and we are satisfied that the imposition of the more severe sentences rested on a substantial and not an arbitrary basis. The reason for the sentences does not violate procedural policies or 'standards consistent with the just administration of the criminal law.'" 239 A 2d at 259.

At least four Federal Circuit Courts have held, in varying degrees, that upon new trial the trial judge may impose a sentence greater than the one vacated.

In *MARANO v. UNITED STATES*, 374 F. 2d 583 (1st Cir. 1967), defendant received a sentence of three years after being convicted in the United States District Court of receiving stolen goods transported in interstate commerce. Upon appeal his conviction was set aside and a new trial granted. At his second trial he was convicted of the same offense and received a five year sentence. The same judge presided at trial and sentencing at both trials. The District Court, in imposing the five year sentence, expressly disclaimed that it was penalizing the defendant for having appealed and gave two reasons for increasing the sentence: "Mr. Marano's sentence was based on evaluation of the pre-sentence report and the additional testimony which came out at the trial." The First Circuit Court of Appeals held that defendant's right of appeal must be "unfettered" and concluded that the increased sentence based on additional testimony adduced at the retrial was improper. "As we have recently held, a defendant's right of appeal must be unfettered." *WORCHESTER v. COMMISSIONER OF INTERNAL REVENUE*, 1 Cir. 1966, 370 F. 2d 713. So far as sentence is concerned, this principle cannot be restricted to those situations in which a defendant, in deciding whether to appeal, must contemplate the certainty of an increased sentence if he obtains a new trial and is convicted again. Not only must he not be faced with such a certainty, *WORCHESTER v. INTERNAL REVENUE*, *supra*, he likewise should not have to fear even the possibility that his exercise of his right to appeal will result in the imposition of a direct penalty for so doing." 374 F. 2d at 585. The Court did, however, recognize an exception with respect to presentence reports, stating,

"We do not think it inappropriate for the Court to take subsequent events into consideration, both good and bad." 374 F. 2d at 585. The Court pointed out that if a sentence was increased following retrial the "grounds for doing so should be made affirmatively to appear." Id. at 585-586, N. 3.

The question presented the Court in *NEWMAN v. RODRIGUEZ*, 375 F. 2d 712 (10th Cir. 1967) was: "Is the State of New Mexico required under the equal protection clause of the United States Constitution to give credit for time served on a void sentence upon reconviction following a new trial." Id. at 712.

Newman, in December, 1963, without the aid of counsel, pleaded guilty to obtaining money by fraud and was sentenced to one to five years. He was ordered released in a state habeas corpus proceeding in June, 1964, on the ground that his guilty plea was invalid. Two months later, now represented by counsel, he pleaded not guilty to the same charge and was convicted and sentenced again to one to five years. Credit was denied him for the time spent in prison on the vacated conviction. Without articulating its reasons the Court of Appeals for the Tenth Circuit concluded that the denial by New Mexico of credit for the time served on a void sentence was not constitutionally impermissible.

In *UNITED STATES EX REL. STARNER v. RUSSELL*, 378 F. 2d 808 (3rd Cir. 1967), cert. den. 389 U.S. 889 (1967), reh. den. 389 U.S. 997 (1967), the defendant pleaded guilty in the State Court to eight counts of forgery and two counts of burglary and was sentenced to two to eight years. The conviction was thereafter set aside on the ground that right to counsel had been violated. The defendant was then tried and convicted on the forgery counts (the burglary counts were evidently dropped) and sentenced to three and one-half to seven years. The defendant filed a Petition for Writ of Habeas Corpus in the United States District Court and the Court held that the second sentence was unconstitutional because of the insufficiency of the sentencing court's reason for imposing a greater sentence. 260 F. Supp. 265 (M.D. Pa. 1966). The opinion of the District Court was based on *PATTON v. STATE OF NORTH CAROLINA*, 256 F. Supp. 225

(W.D. N.C. 1966). On appeal, the Third Circuit held that the increased sentence was not improper and reversed:

The Court was shocked that the integrity of the trial judge was being challenged, as had successfully been done in MARANO and the District Court Opinion in PATTON. As the Third Circuit Court of Appeals stated:

"We differ with the Court's (MARANO) opinion for the reason that we cannot properly speculate that the court certainly will increase the sentence, after a new trial. To so hold would seem to trespass the integrity of the trial judge who, upon hearing all the evidence, with the whole panorama of defendant's crime laid out before him, conscientiously passes sentence in accordance therewith, even though here the defendant did not take the stand nor call witnesses on his behalf. The sentence thus imposed by the trial judge cannot, in any sense, be said to be for his appealing, unless we again attribute to him a base motive—penalizing him for his appeal, conduct unworthy of the name of judge—rather than for his weighing and evaluating the measure of defendant's crime and passing sentence thereon, in light of the wider, factual area encompassed by the trial which, in most instances, is far more revealing than those factual elements taken into consideration in the imposition of sentence upon a plea of guilty . . . When he appeared and entered a plea of not guilty at the second trial, the slate had been wiped clean and it was an entirely new case and bore no relationship whatsoever to his previous plea of guilty which he had entered." 378 F. 2d at 811.

The Court concluded that Federal review of State sentencing practices "would be a flagrant trespass of an independent state judiciary" and a decision by the highest tribunal of the State should not be vacated "unless it clearly flouted constitutional standards of due process." 378 F. 2d at 812.

See also, UNITED STATES v. FAIRHURST, 388 F. 2d 825 (3rd Cir. 1968), cert. den. ____ U.S. ____ (1968).

In UNITED STATES v. WHITE, 382 F. 2d 445 (7th Cir.

1967), cert. den. 389 U.S. 1052 (1968), the Seventh Circuit Court of Appeals specifically declined to follow the Fourth Circuit Court of Appeals decision in *PATTON v. NORTH CAROLINA*, 381 F. 2d 636, (4th Cir. 1967) and the First Circuit Court of Appeals decision in *MARANO v. UNITED STATES*, 374 F. 2d 583 (1st Cir. 1967). In determining that the imposition of a longer sentence at the second trial than was imposed at the first trial did not violate the due process clause of the Fourteenth Amendment nor the double jeopardy provision of the Fifth Amendment, the Seventh Circuit stated that "we approve of the statement of the Third Circuit in *UNITED STATES EX REL. STARNER v. RUSSELL*, No. 16392, (3rd Cir., May 25, 1967), that a trial judge, 'when a new trial is ordered, may impose a sentence greater than the one he had earlier vacated, and . . . it is unnecessary to articulate the reason for any differentiation in the term of the sentence.'" 382 F. 2d at 449-50.

As to the argument that imposing a longer sentence at the second trial than was imposed at the first trial violated the double jeopardy provision of the Fifth Amendment, the Seventh Circuit of Appeals stated:

"Similarly as to the defendant's double jeopardy argument, we do not believe that the Fifth Amendment prohibits different punishments upon reconviction for the same crime following a successful appeal when the punishment, whether imposed by the same or a different district judge, results from the judge's exercise of his traditional discretionary function of considering a variety of sentencing factors, many of which have no direct relationship to the crime itself.

"We are fully aware of the recent decisions of other courts, dealing with these and related questions, which have expressed views contrary in many respects to those expressed herein. We think, however, that the pronouncement of a constitutional principle as sweeping and inflexible as that discussed in certain of these decisions and urged here by the defendant should await the considered judgment of the Supreme Court, particularly as that Court may choose to refine or abandon whatever

distinctions remain between *GREEN v. UNITED STATES*, 355 U.S. 184 (1957), and *STROUD v. UNITED STATES*, 251 U.S. 15 (1919)." 382 F. 2d at 448.

PATTON v. NORTH CAROLINA, 381 F. 2d 636 (4th Cir. 1967), cert. den. 390 U.S. 905 (1967), upon which *PEARCE* is bottomed, takes issue with the "discretionary" point of view represented in varying degrees by the State and Federal cases discussed.

Patton, unrepresented by counsel, was tried and convicted of armed robbery in October, 1960, after pleading nolo contendere at the close of the State's evidence. He was sentenced to twenty years. No appeal was taken. After the decision in *GIDEON v. WAINWRIGHT*, 372 U.S. 335 (1963), he applied for post-conviction relief and was awarded a new trial. At the second trial on the original indictment, this time with the assistance of counsel, he was convicted and was again sentenced to twenty years. Patton applied to the Federal District Court for habeas corpus where Craven, Circuit Judge, said that "the heart of the question" is "the motivation of the second judge." Judge Craven held that the harsher sentence (since credit has not been "effectively" allowed for the time spent in prison) was a denial of due process and equal protection and a violation of the constitutional doctrine. *PATTON v. STATE OF NORTH CAROLINA*, 250 F. Supp. 225 (W.D. N.C. 1966). The District Court reasoned that the imposition of a harsher penalty, whether a denial of credit for time served or by increased sentence, without there being contained in the record any facts to rationally support the imposition of a harsher sentence, inhibits an individual's right to appeal and unconstitutionally conditions that right.

Affirming on appeal, the Fourth Circuit Court of Appeals held the Due Process Clause, the Equal Protection Clause, and the constitutional prohibition against double jeopardy all require a uniform rule barring the subsequent imposition of a sentence in excess of one, which has been invalidated, stating that "in order to prevent abuses, the fixed policy must necessarily be that the new sentence shall not exceed the old." A closer analysis of the Court's reasoning in *PATTON* is warranted.

I. DUE PROCESS

The PATTON Court agreed with MARANO that additional testimony upon retrial is an insufficient basis to increase sentence, but disagreed with MARANO's dicta that events subsequent to the first trial may provide such a justification. The Court thought that the possibility of a harsher sentence under any circumstances would operate as an "unreasonable condition" or limitation on the right of appeal.

This argument assumes that the second trial judge, in imposing a harsher sentence upon retrial and conviction, will *always* penalize the appellant for having exercised his right to appeal. To adopt such an absolutist doctrine questions the very basis of our system of jurisprudence. As emphasized by Sharp, J., in *STATE v. STAFFORD*, *supra*:

"Historically, the presumption has been that a judge will act fairly, reasonably and impartially in the performance of the duties of his office, . . . (Citation omitted). Our entire judicial system is based upon the faith that a judge will keep his oath. Since, however, *all* judges are human, from time to time one or more will err. Notwithstanding, we have no choice but to make men judges. * * * So long as errands make it necessary for other men to judge them it is best to indulge the presumption that a judge will do what a judge ought to do. Actually we have no other choice. Furthermore, men seek to justify the confidence they believe to be reposed in them.

"It would demean the entire judiciary for the appellate branch to assume that trial judges—who bear the brunt of the administration of justice and from whose ranks so many ascend to courts of last resort—will penalize with 'harsher' sentences one who appeals or exercises a constitutional right which entitled him to a new trial. In our lexicon a sentence is harsh only when it exceeds merited punishment." 274 N.C. at ----.

Subject only to the constitutional provision forbidding the States to deprive persons of their life, liberty, or property, without due process of law, "(t)he power to prescribe the

penalty to be imposed for commission of a crime rests with the legislature, not with the courts." 21 AM. JUR. 2d, CRIMINAL LAW §577. As stated by this Court in COLLINS v. JOHNSTON, 237 U.S. 502, 510 (1915), "to establish appropriate penalties for the commission of crime, and to confer upon judicial tribunals a discretion respecting the punishment to be inflicted in particular cases, within limits fixed by the lawmaking power, are functions particularly belonging to the several states . . ."

At his second trial, Pearce was convicted of assault with intent to commit rape which, as provided for by our legislature, may be punished by a term of imprisonment of one to fifteen years. N. C. G. S. 14-22. To adopt the conclusion in PATTON that the sentence imposed upon the first trial sets the maximum punishment that may be imposed upon a retrial is an unwarranted infringement both on the sovereign power of the State to prescribe the penalty to be imposed for a crime and the discretion of the trial court to impose a penalty within the statutory maximum.

In North Carolina, where a defendant pleads guilty, or nolo contendere, which is equivalent to a plea of guilty in this State, STATE v. WORLEY, 268 N.C. 687, 151 S.E. 2d 618 (1966), the necessity of proof by the State is obviated. STATE v. CALDWELL, 269 N.C. 521, 153 S.E. 2d 34 (1967). It is common knowledge that trial judges, in considering a plea of guilty as an indication that "the defendant has already entered on the rehabilitative process . . . (and) is purging himself thereby of his wrong doing," UNITED STATES EX REL. STARNER v. RUSSELL, *supra*, at 811, generally extend more leniency than when the defendant goes to trial. Where a defendant pleads guilty and is later awarded a new trial for a constitutional defect, e. g., lack of counsel, enters a plea of not guilty, and the State presents evidence not produced at the first trial of the gravity of the crime charged and that the defendant had habitually engaged in other misconduct, upon conviction, if either PATTON or MARANO is adopted the discretion of the trial judge to impose an appropriate sentence would be unduly fettered. As stated by Mr. Justice Black in WILLIAMS v. NEW YORK, 337 U.S. 241, 247 (1949):

"A sentencing judge, however, is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant—if not essential—to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics."

In this case on appeal, the following judgment was, tendered by the second trial judge:

"It is the intention of this Court to give the defendant a sentence of fifteen years in the State Prison; however it appears to the Court from the records available from the Prison Department that the defendant has served 6 years, 6 months and 17 days flat and gain time combined, and the Court in passing sentence in this case is taking into consideration the time already served by the defendant. IT IS THE JUDGMENT of this Court that the defendant be confined in the State's Prison for a period of eight years." Appendix 3.

Surely this does not support the fears exemplified in PATTON; but, conclusively exhibits the contrary.

Furthermore, if such a lack of integrity is to be assumed in our trial judges, can these same judges not easily circumvent PATTON by imposing the maximum sentence at the first trial?

We conclude, therefore, that "(w)eighing the danger that on a second trial the judge will vindictively punish a prisoner for asserting his rights against the hazards which accompany a flat prohibition of increased sentences, it is our considered opinion that the likelihood of judicial malfeasance is the lesser danger." STATE v. STAFFORD, *supra*, at _____. Unless the defendant can show affirmatively that the second trial judge in imposing a harsher sentence has acted with improper motive, the increased sentence does not deprive the defendant of due process. As was stated in UNITED STATES EX REL. STARNER v. RUSSELL, *supra*, at 811 (quoted with approval in UNITED STATES v. WHITE, *supra*, at

449-50), where a new trial is ordered the judge "may impose a sentence greater than the one he had earlier vacated, and . . . it is unnecessary to articulate the reason for any differentiation in the term of the sentence."

II. EQUAL PROTECTION

The PATTON Court based its conclusion that the Equal Protection Clause of the Fourteenth Amendment prohibits a sentence in excess of the one invalidated upon the rationale that if all persons confined to prison are considered as a class, only those who choose the right of appeal are subjected to the possibility of receiving a greater sentence. As the Court stated:

"North Carolina strictly forbids an increase in a defendant's sentence after the trial court's term has expired and service of sentence has commenced. Thus the threat of a heavier sentence falls solely on those who utilize the post-conviction procedures provided by the State. If the State wishes to institute a system permitting upward revision of sentences, it must proceed upon a rational basis in selecting the class of prisoners it will subject to this threat. It may not discriminate in this regard against those who have availed themselves of the right to a fair trial. This is an arbitrary classification offensive to the equal protection clause." 381 F. 2d at 642.

Although all of the states now provide for some method of appeal, a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review. *McKANE v. DURSTON*, 153 U.S. 684 (1894). Where provision for appeal is guaranteed, "at all stages of the proceedings the Due Process and Equal Protection Clauses protect persons . . . from invidious discriminations." *GRIFFIN v. ILLINOIS*, 351 U.S. 12, 18 (1951).

GRIFFIN held that a defendant was denied equal protection when, because of indigency, he was refused a trial transcript on appeal. The Court stated that those defendants who exercised an appeal represented a class and that this class could be sub-divided as follows: A sub-class composed of those denied trial transcripts on appeal because of indigen-

cy and a sub-class consisting of those who could afford transcripts. Consequently, those able to purchase a transcript maintained an advantage on their appeals and therein lay the equal protection violation. See also, *DOUGLAS v. CALIFORNIA*, 372 U. S. 353 (1963); *BAKER v. CARR*, 369 U.S. 186 (1962).

No such classification can be made in either *PATTON* or *PEARCE* within the class which seeks to appeal. All defendants exercising their right to appeal are subject to a potentially harsher sentence and all stand on equal footing in their separate appeals. There is no arbitrary discrimination within the class of appellants in the *PATTON* or *PEARCE* situation.

III. DOUBLE JEOPARDY

Although stating that "we need not rest our decision on double jeopardy grounds," 381 F. 2d at 643, the *PATTON* Court held that "the constitutional protection against double jeopardy would be violated if an increased sentence or a denial of credit is permitted on retrial." 381 F. 2d at 643.

It is beyond question that when a defendant obtains a new trial by appealing his conviction he waives his right against re prosecution. *BALL v. UNITED STATES*, 163 U.S. 662 (1896).

In *STROUD v. UNITED STATES*, 251 U.S. 15 (1919), reh. den. 251 U.S. 380 (1920), the defendant had been convicted in state court of first degree murder and sentenced to be hanged. That judgment was reversed and the defendant was retried. He was again convicted of first degree murder and this time sentenced to life imprisonment. He again successfully attacked his conviction, was retried, convicted again, and sentenced to death. This Court affirmed the conviction, stating that the defendant had not been placed in double jeopardy because "the plaintiff in error himself invoked the action of the Court which resulted in a further trial." *Id.* at 18. Although the issue of due process was never raised in *STROUD*, it would appear that upon the facts the opinion of the Court necessarily approved an increased sentence upon retrial after appeal.

This decision was held to be controlling in 1960 on a subsequent appeal in the same case. *STROUD v. UNITED STATES*, 283 F. 2d 137 (10th Cir. 1960) cert, den. 365 U.S. 864 (1961).

The PATTON Court resolved the question of the non-applicability of the double jeopardy provision to the states, as held in *STROUD*, in a footnote, 381 F. 2d at 643, N. 20, by relying on a second circuit opinion. *UNITED STATES EX REL. HETENYI v. WILKINS*, 348 F. 2d 844 (2d Cir. 1965).

In *HETENYI*, Judge (now Justice) Thurgood Marshall pointed out that under the Supreme Court cases "(t)he Due Process Clause of the Fourteenth Amendment imposes some limitations on the states' power to re-prosecute an individual for the same crime." 348 F. 2d at 849. The Court concluded that the double jeopardy clause is applicable to the states because the "basic core" of the double jeopardy guarantees are as fundamental as "those other guarantees of the Bill of Rights already held by the Supreme Court . . . to be absorbed" *Id.* at 853.

PATTON further rationalized that this Court intended, by implication, to overrule *STROUD* in *GREEN v. UNITED STATES*, 355 U.S. 184 (1957), where this Court held that conviction in the federal courts of a successful appellant at his retrial for an offense greater than that for which he had been convicted at the first trial violated the double jeopardy principle.

It is first pointed out that *GREEN* was premised on the theory that a conviction of a lesser offense at the first trial was an implied acquittal of all greater offenses with which the defendant had been charged and that this benefit was not waived when he attacked his conviction for the lesser offense. *GREEN* did not include those cases dealing with harsher punishment at retrial. Moreover, the Court in *GREEN* made it crystal clear that "*STROUD v. UNITED STATES*, 251 U.S. 15, 64 L. ed 103, 40 S. Ct. 50, is clearly distinguishable. In that case a defendant was retried for first degree murder after he had successfully asked an appel-

late court to set aside a prior conviction for the same offense." 355 U.S. at 195, N. 15. Furthermore, doubt of an implied vitiation is continued by the language of Justice Brennan in *FAY v. NOIA*, 372 U.S. 391 (1963), when without referring to *STROUD*, he said:

"For Noia to have appealed in 1942 would have been to run a substantial risk of electrocution. His was the grisly choice whether to sit content with life imprisonment or to travel the uncertain avenue of appeal which, if successful, might well have led to a retrial and death sentence. See, e.g., *PALCO v. STATE OF CONNECTICUT*, 302 U.S. 319, 58 S. ct. 149, 82 L. ed. 288." 372 U.S. at 439-440.

PATTON also attempted to distinguish *STROUD* as follows:

"From a reading of the *Stroud Opinion*, it appears that the case was argued to the Court on the theory that the defendant was put twice in jeopardy for the same offense merely by being retried on an indictment for first degree murder. There is no indication that the Court was presented with the argument that the risk of an increased penalty on retrial violates the double jeopardy clause by being a double punishment for the same offense. *Stroud* thus stands for no more than the well-established proposition that the double jeopardy clause does not entitle a defendant who successfully attacks his conviction to absolute immunity from reprosecution." 381 F. 2d at 644-645.

In so distinguishing *STROUD*, PATTON is on a collision course with the holding of this Court in *MURPHY v. MASSACHUSETTS*, 177 U.S. 155 (1900), to which it made no reference.

In *MURPHY*, the defendant had his initial sentence imposed by the State of Massachusetts vacated. He was re-sentenced and appealed to this Court alleging that his constitutional right against double jeopardy and his right to due process of the law had been violated because the new sentence imposed an increased penalty. This Court held the sec-

ond sentence was not invalid because "it might turn out to be for a longer period of imprisonment," and that "the plea of former conviction cannot be maintained because of service of part of a sentence reversed or vacated on the prisoner's own application." 177 U. S. at 162.

MURPHY is still the law of the land. It was held to be controlling in *KING v. UNITED STATES*, 98 F. 2d 291 (D.C. Cir. 1938).

In *KING*, the Court of Appeals for the District of Columbia held that a second sentence was not invalid because the first, void because it did not contain the words "at hard labor," was increased. In so holding, the Court said: "Until a convicted prisoner receives a sentence which can withstand attack, it may be conceived that his original jeopardy continues without interruption, and that he is therefore not put in jeopardy a second time when he receives his first valid sentence A close parallel is the doctrine that when a conviction is reversed, the prisoner cannot complain if on a later conviction he is given a severer sentence." *Id.* at 295.

See also, *UNITED STATES v. SANDERS*, 272 F. Supp. 245 (E.D. Cal. 1967).

We think the law here was correctly stated by Chief Judge Haynsworth in his dissent in *UNITED STATES v. WALKER*, 346 F. 2d 428 (4th Cir. 1965): "When a sentence is imposed upon a defendant following a first trial, the Government may not attack it, but the defendant can. If he chooses to do so and succeeds in obtaining a retrial, he suffers no detriment from the sentence imposed after the first trial, and is entitled to no benefit from it. If his second trial results in a conviction, any lawful sentence may be imposed upon him without regard to the sentence passed after the abortive first trial."

"In that situation, of course, a heavier sentence ought not to be imposed upon a defendant because he sought vindication of his legal rights and succeeded in obtaining an order for a new trial. Judicial vindictiveness for resort to judicial processes is morally wrong, but the judge who presides at a second trial has the power and the duty to impose any

sentence authorized by law, which, in light of all the facts and circumstances then known to him, other than the defendant's litigiousness, seems most appropriate and just." *Id.* at 432.

We firmly believe that the conclusion reached by the PATTON Court that the Fifth Amendment protection against double jeopardy applies to an increased sentence at retrials is erroneous. We are reassured by the brief prepared by Mr. (now Justice) Abe Fortas, counsel for the petitioner in *GIDEON v. WAINWRIGHT*, 372 U.S. 335 (1963). In reassuring this Court that the overruling of *BETTS v. BRADY*, 316 U.S. 455 (1942), would not result "in releasing indeterminate numbers of prisoners in some states," counsel for petitioner said: "*First*, it must be noted that a defendant who obtains a reversal of his conviction may be retried for the offense of which he was convicted. (Citations omitted). Moreover, it is possible that an even more severe sentence than that originally levied may be imposed at the conclusion of the second trial." (Citations omitted). P. 44 of the brief for petitioner, *GIDEON v. WAINWRIGHT*.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this case should be reversed and remanded to the United States Court of Appeals for the Fourth Circuit.

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CERTIFICATE

I, ANDREW A. VANORE, JR., one of the Attorneys for the petitioners and a Member of the Bar of the Supreme Court of the United States hereby certify that, in accordance with the instructions by letter dated November 13, 1968, received from the Clerk of this Honorable Court, on the 10th day of December, 1968, I served a typewritten copy of the foregoing brief on the attorney of record for the respondent, by mailing such typewritten copy in a duly addressed envelope with first class postage prepaid addressed as follows:

TO: Larry B. Sitton, Esquire
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I further certify that on the date said brief was received from the printer I served two copies of same upon said attorney in the manner set forth hereinabove.

ANDREW A. VANORE, JR.
Staff Attorney

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In The

Supreme Court of the United States

OCTOBER TERM, 1968

NO. 418

**CURTIS M. SIMPSON, Warden, Kilby Prison,
Montgomery, Alabama**

PETITIONER

VS.

WILLIAM S. RICE,

RESPONDENT

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

BRIEF FOR THE PETITIONER

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit affirming the United States District Court for the Middle District of Alabama granting the petition for writ of habeas corpus, dated May 30, 1968, is reported as *Simpson v. Rice*, 396 F. 2d 499.

The opinion of the United States District Court for the Middle District of Alabama granting the respondent's motion to file in forma pauperis his application for a writ of habeas corpus, dated July 17, 1967, is reported as *Rice v. Simpson*, 271 F. Supp. 267.

The opinion of the United States District Court for the Middle District of Alabama granting the writ of habeas corpus, dated September 26, 1967 is reported as *Rice v. Simpson*, 274 F. Supp. 116.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on May 30, 1968. A petition for a writ of certiorari was filed on August 19, 1968, and was granted on November 12, 1968. The jurisdiction of this Honorable Court rests on Title 28, United States Code, Section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Fourteenth Amendment to the Constitution of the United States.

QUESTIONS PRESENTED

I

Whether a State court may increase punishment following a new trial on a plea of not guilty where the first sentence imposed on a plea of guilty is vacated on the prisoner's contention that he was denied counsel at the first trial.

II

Whether it was constitutionally permissible to deny to the respondent credit on subsequent valid sentences for time served on a prior void judgment.

STATEMENT

The respondent, William S. Rice, filed in forma pauperis his application for writ of habeas corpus in the United States District Court for the Middle District of Alabama. (R. p. 5.) He alleged that in the Circuit Court of Pike County, Alabama, in February 1962, upon pleas of guilty to four separate

indictments charging the offenses of burglary in the second degree, he was sentenced to a total of ten (10) years in the State penitentiary. He further alleged that in August, 1964, the judgments and sentences in these cases were set aside by said State court after a hearing upon his application for writ of error coram nobis. The basis for this action was that the respondent was not represented by counsel at the time he entered his pleas of guilty in 1962. The respondent also alleged that in December, 1964, he was retried in Case No. 6427, and in Case No. 6428, and was sentenced to a term of ten (10) years in each case. He also stated that in May, 1965, he was convicted in Case No. 6430, and sentenced to a term of five (5) years. Case No. 6429 was nol prossed on the motion of the State Solicitor in May, 1965.

In regard to Case No. 6429 the State Solicitor stated, (R. pp. 55 and 56) as follows:

"I was informed by the Sheriff that the owner of the service station involved in the charge in case number 6429 had left Alabama, and as I remember, resided in North Carolina. Taking into consideration the distance involved, the other sentences and the fact that defendant had already served in prison between his original plea of guilty and his petition for writ of error coram nobis which had been granted, I moved the Court to nolle pros. Judge Eris F. Paul, the trial judge, concurred and the order was made. This motion was made by me with knowledge of the fact that the defendant had spent a vast majority of his adult life in prison, according to his FBI record."

The respondent contended that the Circuit Court of Pike County, Alabama, failed to give him credit for prior time served on one of his original sentences and that the sentences resulting in his present incarceration violated his constitutional rights in that said sentences constitute punishment for his having exercised his right and having been successful

in a State post-conviction proceeding. The respondent contended that it is not constitutionally permissible for the State of Alabama to deny him credit for time served on his void sentence, and that a State trial court may not constitutionally impose sentences greater than those imposed upon his first trial.

The United States District Court allowed the filing of the application for writ of habeas corpus and denied the petitioner's motion to dismiss. (R. p. 56.)

After a hearing on the merits of the case (R. pp. 79-143) said District Court held that the State of Alabama must give the respondent credit for the time he served upon the void sentence imposed in February, 1962, in Case No. 6427. Said Court also held that the maximum time which could constitutionally be imposed by the Circuit Court of Pike County, Alabama, upon the respondent was four (4) years in Case No. 6427, two (2) years in Case No. 6428, and two (2) years in Case No. 6430. The Court also ordered that under its calculation, the excess time which had been served in Case No. 6427 to the date of the Court's order must be credited to Case No. 6428 and Case No. 6430. (R. pp. 57-73.)

The effect of the order of said District Court was that the respondent had finished serving his sentence in Case No. 6427 and that he must be given credit for excess time served, as such time was calculated by the Court, toward the sentences in Cases No. 6428 and 6430.

Curtis M. Simpson, as Warden of Kilby Prison, Montgomery, Alabama, took an appeal to the United States Court of Appeals for the Fifth Circuit (R. p. 74) and on May 30, 1968, said Circuit Court of Appeals affirmed the order and judgment of the United States District Court for the Middle District of Alabama. *Simpson v. Rice*, 396 F. 2d 499.

A petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit was filed in this

Honorable Court on August 19, 1968, and the writ was granted on November 12, 1968.

ARGUMENT

I

The first and paramount question presented is whether, under the facts of the case at bar, a State trial court may constitutionally subject a person to a more severe punishment upon a second conviction under an indictment than was imposed upon him on his first conviction under such indictment. This question should be answered in the affirmative.

The majority of the courts which have been faced with the question have held or indicated that it is permissible to impose upon a defendant convicted at a new trial of the same crime of which he was previously convicted a more severe punishment than was imposed upon his earlier conviction. This seems to be the better rule from the standpoint of both society and the accused in the administration of criminal justice.

In the case of *United States v. Russell*, 378 F. 2d 808 (3rd Cir. 1967) the Court considered an appeal from a habeas corpus proceeding, the facts of which are strikingly similar to the case at bar. It was there held that imposing a greater sentence on fewer counts after a new trial of the case before a jury than was given the petitioner on his plea of guilty at his first trial did not violate constitutional standards of due process. The Court said, in part, as follows:

"While we are wholeheartedly in agreement with the principles laid down in *Gideon v. Wainwright*, * * *, it must be conceded that only the fact of not being represented by counsel in the pre-court proceedings gave him the second opportunity to plead his case and he chose to go to trial and have a jury test the accusations against him. When he appeared and entered a

plea of not guilty at the second trial, the slate had been wiped clean and it was an entirely new case and bore no relationship whatsoever to his previous plea of guilty which he had entered."

In the case of *United States v. White*, 382 F. 2d 445 (7th Cir. 1967), the Court held that different punishments may be imposed upon reconviction of the same crime following a successful appeal when the punishment results from the judge's exercise of his judicial discretionary function of considering a variety of sentencing factors, many of which have no direct relationship to the crime itself.

The following cases support, either expressly or by implication the view that a defendant, in obtaining a new trial, assumes the risk of a more severe sentence than was first imposed should he again be convicted of the same crime under the same indictment:

ROBINSON V. UNITED STATES,
144 F. 2d 392 (6th Cir.)
Cert. Den. 324 U. S. 282,
89 L. Ed. 629, 65 S. Ct. 666;

HOBBS V. STATE,
231 Md. 533, 191 A. 2d 238,
Cert. Den. 375 U. S. 914,
11 L. Ed. 2d 153, 84 S. Ct. 212;

HICKS V. COMMONWEALTH,
345 Mass. 89, 195 N. E. 2d 739,
Cert. Den. 374 U. S. 839,
10 L. Ed. 2d 1060, 83 S. Ct. 1891;

STATE V. WHITE,
262 N. C. 52, 136 S. E. 2d 205,
Cert. Den. 379 U. S. 1005,
13 L. Ed. 2d 707, 85 S. Ct. 726;

STATE V. KNEESKERN,
203 Iowa 929, 210 N. W. 465;

STATE V. MORGAN,
145 La. 585, 82 So. 711;

SANDERS V. STATE,
239 Miss. 874, 125 So. 2d 923;

COMMONWEALTH EX REL. WALLACE V.
BURKE,
169 Pa. Super. 633, 84 A 2d 254;

STATE V. SQUIRES,
(1966, S. C.) 149 S. E. 2d 601.

This Honorable Court held in *Stroud v. United States*, 251 U. S. 15, 64 L. Ed. 103, 40 S. Ct. 50, that a prisoner's constitutional rights were not violated when he was convicted of first degree murder with the death penalty after reversal of a first conviction of the same degree but with a life sentence. This is the only case in which this Honorable Court has heretofore written to the question involved.

Sentences totaling five years more of imprisonment than were imposed upon the first trial for armed robbery were affirmed in *Hobbs v. State*, supra. The Court in this case rejected the contention that the imposition of new sentences in the second trial, resulting in a greater period of confinement, were unlawful. The Court declared that ordinarily any punishment authorized by statute and within the statutory limits was not cruel and unusual, and held that in asking for and receiving a new trial a defendant must accept the hazards as well as the benefits resulting therefrom.

The imposition of a 12 year sentence on a third conviction for manslaughter was affirmed in *Sanders v. State*, supra, where in the first trial the defendant had been sentenced to serve a term of ten years. Pointing out that in

that case the first judgment was reversed at the defendant's instance, the Court declared that it could not say that the trial judge on the present trial was in error in pronouncing a sentence of 12 years.

For the sake of brevity we will not discuss in detail each of the cases listed hereinabove. Suffice it to say that each Court rejected any contention that the State was limited as to the term of the sentence pronounced upon the accused by the punishment imposed upon his first trial.

Courts have recognized that pleas of guilty are the result of a bargain or agreement with the prosecutor and that a guilty defendant must always weigh the possibility of receiving a more severe sentence on a plea of not guilty than he will receive as a result of an agreement with the prosecutor for a lighter sentence. *Cooper v. Holman*, 356 F. 2d 82 (5th Cir.), and *Cortez v. United States*, 387 F. 2d 699 (9th Cir.).

In Alabama maximum sentences which may be imposed upon persons convicted of crime are fixed by statutes. The effect of the judgment of the court below in the case at bar is to reduce this statutory maximum as to the respondent. If said judgment is allowed to stand the trial courts of the State of Alabama will not be allowed to impose maximum sentences upon convictions after pleas of not guilty in cases in which the accused has been previously sentenced to short terms upon pleas of guilty.

The judgment below approves the finding of the District Court that no justification is shown in the case at bar for more severe punishment after reconviction. It is respectfully submitted that the petitioner should not have been required to show any fact other than the fact that the first conviction was on a plea of guilty and the second conviction was imposed only after a trial on a plea of not guilty. One accused of crime is in many instances given a lighter sentence when he enters a plea of guilty than when he is convicted

after insisting that he is not guilty. It is our contention that this is a healthy situation from the standpoint of the accused as well as from the standpoint of society. See *United States v. Russell*, supra.

This Honorable Court has never held that a more severe punishment on a second trial is unconstitutional. The better and more just reasoning is found in those cases which hold that a new trial bears no relationship to a previous plea of guilty and begins with the slate wiped clean.

II

The second question presented by the case at bar concerns the right of a State convict to credit for time served under a void judgment of conviction necessitating a new trial.

The position of the State of Alabama in regard to this question is reflected by the opinion of the Alabama Court of Appeals dated November 28, 1967, in the case of *Goolsby v. State*, 6th Div. 202, and the case of *Ex Parte State of Alabama ex rel Attorney General*, 6th Div. 543. The latter case was decided by the Supreme Court of Alabama on October 3, 1968, and modified the opinion expressed in the *Goolsby* Case. Both of these opinions are unreported to date. The opinion of the Alabama Court of Appeals is printed in Appendix A, hereto, infra, and the opinion of the Supreme Court of Alabama is printed in Appendix B, hereto, infra.

The opinion of the court below (R. p. 150) which adopts the opinion of the District Court for the Middle District of Alabama (R. p. 57) held that it is not constitutionally permissible for the State of Alabama to deny to the respondent credit for time served on a void judgment to be applied to sentences imposed by subsequent valid judgments. Said opinion of the court below is in direct conflict with the case of *Newman v. Rodriguez*, 375 F. 2d 712 (10th Cir. 1967). See also *State v. King*, 180 Neb. 631, 144 N. W. 2d 438; *State*

ex rel Ivey vs. Meadows, (Tenn.) 393 S.W. 2d 744; and *Wolford v. Warden*, 215 Md. 640, 137 A. 2d 646.

Subsequent to the date of the decision in *Hill v. Holman*, 255 F. Supp. 924, a State prisoner in Alabama has been given credit for time served on a void sentence when there is another valid sentence pending against him during the period such time is served. See also *Youst v. United States*, 151 F. 2d 666 (5th Cir. 1945).

Neither *Hill v. Holman*, supra, nor *Youst v. United States*, supra, should control the case at bar.

In the case of *Hill v. Holman*, supra, which was decided by the same United States District Court before which the case at bar was originated, a writ of habeas corpus was granted and a State prisoner was held entitled to his immediate release. The opinion of said District Court in that case was very broad and the dictum found therein would control the case at bar if the facts of the two cases were identical. However, such facts were not identical since the prisoner involved in the case of *Hill v. Holman*, supra, had actually served the time imposed upon him under all his valid sentences at the time of his release.

The case of *Youst v. United States*, supra, does not control the case at bar since the opinion in that case applied credit for time served under a void judgment to a valid sentence which existed during the period such time was served.

The case of *Hill v. Holman*, supra, cites *Hoffman v. United States*, 244 F. 2d 378 (9th Cir. 1957). The *Hoffman* case recognizes the principle that time served should be applied to existing valid sentences, however, the prisoner in said case was not released because he had not been incarcerated for a time equal to his sentences under admittedly valid judgments.

As pointed out hereinabove the judgment of the court below is in direct conflict with the case of *Newman v. Rodriguez*, supra, which held that the denial to a State prisoner of credit for time served on a void judgment was constitutionally permissible. The facts of that case are similar to the facts in the case at bar. In the case at bar as well as in the *Newman* Case there was no valid judgment pending against the prisoner at the time his conviction was declared to be void. Cf. *Meyers v. Hunter*, 160 F. 2d 344 (8th Cir. 1947); Cert. Den. 331 U. S. 852, 91 L. Ed. 1860, 67 S. Ct. 1730.

In footnote 6 to the order of the District Court in the case at bar (R. p. 72), the Court recognizes that its holding is in conflict with the opinion rendered in the case of *Newman v. Rodriguez*, supra.

In Alabama the maximum sentence which may be imposed upon an accused found guilty of the offense of burglary in the second degree is ten (10) years in each case. Under the order of the District Court in this case, as of August 31, 1967, the respondent had served four (4) years, five (5) months and eight (8) days in the penitentiary. (R. p. 72) Two (2) years, eight (8) months and twenty-two (22) days of this time had been served on his valid judgment in Case Number 6427.

Since the valid sentences imposed upon the respondent total twenty-five (25) years, it becomes apparent that the State of Alabama has not ordered this convict to serve sentences totaling more than the maximum time allowed by statute. See *Ex Parte State of Alabama ex rel Attorney General*, supra.

Therefore, the State of Alabama has not violated any constitutional right of the respondent by denying to him credit for the two (2) years, six (6) months and twelve (12) days served by him on his void sentence in Case Number 6427. Cf. *Newman v. Rodriguez*, supra.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this case should be reversed and remanded to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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Attorney General of Alabama

PAUL T. GISH, JR.
Assistant Attorney General
of Alabama
Counsel For Petitioner

CERTIFICATE

I, Paul T. Gish, Jr., one of the Attorneys for the petitioner and a Member of the Bar of the Supreme Court of the United States hereby certify that, in accordance with the instructions by letter dated November 13, 1968, received from the Clerk of this Honorable Court, on the 10th day of December, 1968, I served a typewritten copy of the foregoing brief on the attorney of record for the respondent, by mailing such typewritten copy in a duly addressed envelope with first class postage prepaid addressed as follows:

To: Honorable Oakley W. Melton, Jr.
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339 Washington Avenue
Montgomery, Alabama 36104

I further certify that on the date said brief was received from the printer I served two copies of same upon said attorney in the manner set forth hereinabove.

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APPENDIX "A"

THE STATE OF ALABAMA — JUDICIAL DEPARTMENT
THE ALABAMA COURT OF APPEALS

OCTOBER TERM, 1967-68

6 Div. 202

James Goolsby, alias

v.

State

Appeal from Jefferson Circuit Court

CATES, JUDGE

The facts in this case show that appellant, Goolsby, was indicted by the Grand Jury in July, 1959, on three counts: Count One, burglary; Count Two, grand larceny; and Count Three, buying, receiving and concealing stolen property. Goolsby, without counsel, entered a plea of guilty and was sentenced to serve ten years in the State penitentiary.

September 7, 1965, the judgment was set aside and appellant was granted a new trial. At the second trial, Goolsby filed three pleas of autrefois acquit, which were overruled.

The Attorney General, in brief, gives the following statement of facts:

"The evidence introduced by the State tended to show that the appellant and one Henry Lee Lucas broke a window at the Truck & Auto Rental Company, in Birmingham, Alabama, on September 22, 1959. Upon entering the building through this window they carried a safe from the building through a door which they forced open and loaded the safe on a pick-up truck. This occurred during the early hours of the night. They

hauled the safe to a wooded area located near the reservoir of the Birmingham Water Works and unloaded it.

"The next day the appellant and Lucas opened the safe and took from it certain money and a number of checks.

"After the appellant was arrested Lucas gave himself up to the law enforcement officers and made a statement confessing the crime and implicating the appellant. This statement was introduced into evidence.

"The appellant testified that he did not commit the crime and was not with Lucas on the night of September 22, 1959. He stated that Lucas implicated him in the crime because of a prior difficulty between the two men."

I.

Nowhere in the record before us appears a judgment on Goolsby's plea of guilty at his first arraignment. His brief states that he pleaded guilty to Count One, second degree burglary. Even if this were so, standing alone it would not necessarily acquit him of larceny charged in a separate count. *Bowen*, 106 Ala. 178, 17 So. 335. *Wildman*, 42 Ala. App. 357, 165 So. 2d 396, is concerned with punishment under Code 1940, T. 15, § 387.

When a defendant appeals from a judgment of conviction, he implicitly agrees in case of reversal to return to the stage of proceedings at which the reversible error occurred. A trial, after issue is joined, is of necessity treated as an indivisible unit.

Hence, for error during trial the former jurors are not called back and testimony begun anew, rather we have a new writ, *venire facias de novo* or a new trial. *Sewall v. Glidden*, 1 Ala. 52; *Grossman v. S.*, 241 Ind. 369, 172 N. E. 2d 576.

Under *Gideon v. Wainwright*, 372 U. S. 335, Goolsby's first trial after the coram nobis judgment was a nullity because the court lacked one of its indispensable officers, an attorney for the defendant. We know that Gideon was retried—and acquitted.

If Goolsby's first arraignment was void, so too was any *nol prosequere* consequent thereon. Hence, on the second trial the cause would revert *de novo* to arraignment because this was the severable point in the proceeding at which the former error infected judgment.

In *United States v. Tatoo*, 377 U. S. 463, we find: "The Fifth Amendment provides that no 'person [shall] be subject for the same offence to be twice put in jeopardy of life or limb'. The principle that this provision does not preclude the Government's retrying a defendant whose conviction is set aside because of an error in the proceedings leading to conviction is a well-established part of our constitutional jurisprudence. In this respect we differ from the practice obtaining in England. The rule in this country was explicitly stated in *United States v. Ball*, 163 U. S. 662, 671-672, a case in which defendants were reindicted after this Court had found the original indictment to be defective. It has been followed in a variety of circumstances; see, e. g., *Stroud v. United States*, 251 U. S. 15 (after conviction reversed because of confession of error); *Bryan v. United States*, 338 U. S. 552 (after conviction reversed because of insufficient evidence); *Forman v. United States*, 361 U. S. 416 (after original conviction reversed for error in instructions to the jury).

"That a defendant's conviction is overturned on collateral rather than direct attack is irrelevant for these purposes, see *Robinson v. United States*, 144 F. 2d 392, 396, 397, *aff'd* on another ground, 324 U. S. 282. Courts are empowered to grant new trials under 28 U. S. C. § 2255,

and it would be incongruous to compel greater relief for one who proceeds collaterally than for one whose rights are vindicated on direct review.

See also Anno. 75 A. L. R. 2d 683, particularly § 7, p. 700, et seq.

We see no application here of any potential pleas of former jeopardy even if the appellant were to have properly proved a former judgment of conviction of second degree burglary; and, with an implicit acquittal of grand larceny and receiving stolen goods, *Bell*, 48 Ala. 684, would not apply here. *Brooks*, 42 Ala. App. 69, 152 So. 2d 441, does.

II.

The trial before the jury occurred January 12 and 13, 1966. *Miranda v. Arizona*, 384 U. S. 436, applies to trials after June 13, 1966, as required by *Johnson v. New Jersey*, 384 U. S. 719. See *Mathis*, 280 Ala. 16, 189 So. 2d 564, where we find:

"There is nothing in the record indicating that Mathis, when he made the statements, either had a lawyer who was not permitted to be present, or requested a lawyer, or requested to see anyone."

Hence, Goolsby's pre-*Miranda* confession was admissible under the then extant Alabama practice. The fact that during in-custody interrogation the police did not advise Goolsby of having counsel or of being silent, was only a part of the totality. *Escobedo v. Illinois*, 378 U. S. 478, has been sufficiently discussed in *Duncan*, 278 Ala. 145, 176 So. 2d 840, *Sanders*, 278 Ala. 453, 179 So. 2d 35; *Lokos*, 278 Ala. 586, 179 So. 2d 714; *Mathis*, supra; *Harris*, 280 Ala. 468, 195 So. 2d 521; and *Clark*, 280 Ala. 493, 195 So. 2d 786.

III.

Appellate counsel, extending their claim of double jeopardy, argue also that it was error for the trial judge to

charge as to the elements of grand larceny and receiving, i. e., Counts Two and Three of the indictment.

No objection was made to the oral charge; the verdict was for Count One (second degree burglary). Hence, there is no error. Code 1940, T. 7, § 273.

IV.

Aaron, 43 Ala. App. 450, 192 So. 2d 456, was an appeal from denial of habeas corpus. There *Aaron* tried to contest a second sentence of five years.

The crime carried a possible maximum of twenty years. Two reasons were advanced to affirm: first, inadequate remedy, *Rice v. Simpson*, 271 F. Supp. 267; and, second, the time served plus the new time did not exceed twenty years. This latter was used to refute a claim of excess of jurisdiction as a basis for habeas corpus relief. *City of Birmingham v. Perry*, 41 Ala. App. 173, 125 So. 2d 279.

The instant record, however, presents a direct appeal wherein our review is channeled by Code 1940, T. 15, § 389, which reads:

"§ 389.—In cases taken to the supreme court or court of appeals under the provisions of this chapter, no assignment of errors or joinder in errors is necessary; but the court must consider all questions apparent on the record or reserved by bill of exceptions, and must render such judgment as the law demands. But the judgment of conviction must not be reversed because of error in the record, when the court is satisfied that no injury resulted therefrom to the defendant."

We find nothing to indicate that on allocutus the trial judge here made any enquiry as to the time served on the former conviction. As under *Bryant*, 42 Ala. App. 219, 159

So. 2d 627, failure to go into prior time shown by the official records of the Board of Corrections, we consider to be error requiring not reversal but remandment.

Harsher sentences consequent upon new trials have been viewed by some courts as clogs on the constitutional right of post conviction review. The problem is far from uniformly resolved. See *State v. Turner*, ___ Ore. ___, 429 P. 2d 565; *State v. Wolf*, 46 N. J. 301, 216 A. 2d 586, 12 A. L. R. 2d 970; *Holland v. Boles*, 269 F. Supp. 221; *Patton v. North Carolina*, 256 F. Supp. 225; *United States v. Russell*, 378 F. 2d 808. See Anno. 12 A. L. R. 3d 978.

In fixing any sentence, we think that a trial court should be given latitude. For example, the evidence brought out on a full trial, such as was had here, may exhibit heinousness (or conversely factors of mitigation) not shown on a bare plea of guilty and a presentence investigation.

Certainly the sentencing authority can and should consider at least:

- a) The circumstances of the crime;
- b) The maximum and minimum punishment fixed by the Legislature;
- c) The prospects of reformation;
- d) Deterrence;
- e) Other sentences in other cases;
- f) Time served on a former conviction for the identical crime, including credit, if any, for good behavior; and
- g) The condition of the defendant.

It would be mechanistic jurisprudence arbitrarily to require that the second sentence subtract prior time or that the former sentence be a Plimsoll loadline. There should be

flexibility so that the second sentence should be based on considerations which seem best for society and the defendant at that time.

The judgment below is due to be affirmed as to conviction but the cause is remanded for resentencing in accordance with the foregoing.

AFFIRMED BUT REMANDED FOR RESENTENCING.

After Remandment

CATES, J.

After our Supreme Court adopted the opinion of Judge Simmons, that court in its formal order October 3, 1968, ordered "that the opinion rendered by the Court of Appeals on November 28, 1967, be and is hereby modified so as to conform with the opinion rendered by the Court in this cause on this day."

Further, the Supreme Court went on to affirm the judgment of this Court.

Accordingly, this extension of opinion is entered to memorialize said modification. The cause is remanded to the Circuit Court for proper sentencing.

APPENDIX "B"

THE STATE OF ALABAMA — JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA

SPECIAL TERM, 1968

Ex parte State of Alabama, ex rel. Attorney General
(In re: James Goolsby, Alias

6 Div. 543

v.

State of Alabama)

Petition for Writ of Certiorari to the Court of Appeals

PER CURIAM.

Pursuant to petition here filed by the State of Alabama, this court granted a writ of certiorari directed to the Court of Appeals to send up its record in the foregoing cause for review and consideration by this court.

Petitioner asserts that the Court of Appeals "erred in holding that the record on appeal must show that the trial judge considered time served in prison by the appellant on a void judgment when sentencing said appellant after conviction on a new trial."

We agree with the Court of Appeals that the trial judge committed error requiring remand but not reversal, on allocutus, to inquire as to the time defendant had served, including credit for good behavior, on a former conviction for the identical offense. This inquiry was pertinent in this particular case, but not necessarily mandatory in all cases.

In the instant case, the defendant was indicted in July, 1959. The indictment contained a count for burglary in the second degree, to which the defendant pled guilty, and was sentenced to the maximum of ten years imprisonment in the penitentiary. He was not represented by a lawyer when he

entered this plea. This conviction was subsequently vacated on the petitioner's petition and a new trial was ordered. He was convicted by a jury on a plea of not guilty and again sentenced by the trial judge to ten years imprisonment for the identical offense.

We think that the trial court, on allocutus after conviction the second time, should have made inquiry as to the length of imprisonment, with credit for good behavior, that the defendant had served on the first conviction and sentence, and should have credited the time so served on the proposed ten year sentence. Without such credit defendant would be serving time beyond the maximum fixed by law for the offense of burglary as charged in the indictment.

Such excessive punishment would be in violation of the due process and equal protection provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States, which are now applicable to the several states.

When the defendant is resentenced, the total sentence in point of time, when added to the time already served including credit for good behavior, should not exceed the maximum of ten years. It may be less, within the discretion of the trial court, but not in excess.

We pretermit consideration of the validity vel non of a longer or harsher sentence following a second judgment of conviction than was pronounced on the first judgment of conviction which was invalid. The question of harsher punishment (within lawful limits) on the second conviction than was imposed on the first is not here involved. We have here an excess imprisonment above the maximum.

We are not in accord with the statement in the opinion that the sentencing authority should consider at least certain factors (A to G, inclusive) which are set forth in the opinion. These guidelines might be helpful suggestions to the trial judge in reaching a conclusion as to proper and reasonable

punishment to be imposed on a defendant who has been convicted of a felony, but we do not think the trial judge should be mandatorily fettered by these considerations. The record need not affirmatively show such considerations.

The trial court, in certain offenses, has the prerogative to assess punishment within the legal limits, as sound discretion should dictate. *Yates v. State*, 31 Ala. App. 362, 17 So. 2d 776, cert. den. 245 Ala. 490, 17 So. 2d 777; 7 Ala. Digest, Criminal Law, § 1208(2).

Our appellate court should not usurp or invade the discretionary authority of the trial court in fixing punishment, within lawful limits, by the establishment of mandatory guidelines which the Court of Appeals set out with direction they should be considered.

The opinion of the Court of Appeals is modified. Its judgment affirming the judgment of guilt entered by the trial court and remanding the cause for proper sentence (in conformity with this opinion) is affirmed.

The foregoing opinion was prepared by B. W. Simmons, Supernumerary Circuit Judge, and was adopted by the court as its opinion.

MODIFIED AND AFFIRMED.

Livingston, C. J. and Simpson, Coleman and Kohn, JJ., concur.

I, J. O. Sentell, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court.

Witness my hand this 3rd day of October, 1968.

J. O. SENTELL

Clerk Supreme Court of Alabama

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 413

STATE OF NORTH CAROLINA,
WARDEN R. L. TURNER,

Petitioners,

vs.

CLIFTON A. PEARCE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 413

STATE OF NORTH CAROLINA,
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Petitioners,

vs.

CLIFTON A. PEARCE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

Question Presented

Whether an increased sentence after retrial when the initial conviction and sentence are invalid due to a constitutional error at the original trial offends the Due Process and Equal Protection Clauses of the fourteenth amendment and the Double Jeopardy Clause of the fifth amendment?

Summary of the Argument

An increased sentence after retrial when the initial conviction and sentence are invalid due to a constitutional error at the original trial offends the Due Process and Equal Protection Clauses of the fourteenth amendment and the Double Jeopardy Clause of the fifth amendment.

A. INCREASED SENTENCE AFFECTS BOTH RELEASE AND PAROLE.

An increased sentence on retrial means additional imprisonment for a successful petitioner, since the increased sentence has the effect of postponing a defendant's actual release date. The defendant is also required to serve again the minimum period required in order to become eligible for parole.

B. TRADITIONAL THEORIES JUSTIFYING HARSHER SENTENCES.

Increased sentences are normally justified on the grounds that the first trial is a nullity and the sentence imposed places no limitations upon the sentence at the second trial or that the defendant by seeking a new trial has waived any benefit he might have received under his prior sentence. Application of these theories has been tempered in North Carolina by the requirement that time served under the invalid sentence be credited to the second sentence. Nevertheless, an increased sentence is still possible in North Carolina since the second sentence can be for a longer term than the first sentence.

**C. POSSIBILITY OF AN INCREASED SENTENCE IS A REALITY
TO SUCCESSFUL PETITIONERS.**

Under one survey, seventy percent of those defendants who were retried after successful attack on their original convictions were given increased sentences. The threat of harsher sentences has the effect of deterring defendants from seeking correction of errors in their original trials.

**D. DUE PROCESS IS OFFENDED BY RESTRICTIONS PLACED ON
DEFENDANT'S ACCESS TO POST-CONVICTION RELIEF.**

The threat of harsher sentencing places an unconstitutional condition on the exercise of the defendant's constitutional rights. The state requires that the defendant waive his immunity from an increased sentence in order to seek his right to fair trial. This threat of a harsher sentence impairs the defendant's access to existing post-conviction remedies. A defendant unable to assert his constitutional rights is denied due process. It is fundamentally unfair to provide post-conviction relief and then to restrict its use.

**E. ARBITRARY CLASSIFICATION OF PERSONS EXPOSED TO
HARSHER SENTENCES DENIES EQUAL PROTECTION.**

The class of persons exposed to the risk of harsher sentences includes only those defendants who successfully seek post-conviction relief. Equal protection is denied since there is no reason to believe that this group of successful petitioners deserve an upward revision of their sentences any more than those who were not exposed to the risk.

F. DOUBLE JEOPARDY PROTECTIONS AGAINST MULTIPLE PUNISHMENTS AND REPROSECUTION AFTER ACQUITTAL ARE VIOLATED BY INCREASED SENTENCES.

A harsher sentence on retrial subjects a defendant to double punishment for the same offense, which is prohibited under the Double Jeopardy Clause. Furthermore, when the sentencing authority selects the initial sentence for the defendant from the range of sentences available, the defendant is impliedly acquitted of any greater sentence, even at a subsequent trial.

G. PROHIBITION AGAINST ALL INCREASED SENTENCES IS THE ONLY PROTECTION AGAINST THE APPEARANCE OF IMPROPER MOTIVATION.

An increased sentence should not be allowed under any circumstances. To grant exception to this rule would permit the possibility of improperly motivated judges' increasing sentences to punish those seeking to correct errors in their former trials.

ARGUMENT

An Increased Sentence After Retrial When the Initial Conviction and Sentence Are Invalid Due to a Constitutional Error at the Original Trial Offends the Due Process and Equal Protection Clauses of the Fourteenth Amendment and the Double Jeopardy Clause of the Fifth Amendment.

A. INCREASED SENTENCE AFFECTS BOTH RELEASE AND PAROLE.

A trial judge may increase a defendant's sentence following his conviction on retrial in either or both of two ways: (1) by increasing the length of the original sentence and/or (2) by denying defendant credit for time already served under the invalidated sentence. This denial of credit can affect both the actual release date and defendant's eligibility for parole.

An analysis of the second sentence of Clifton Pearce points up how a harsher sentence is accomplished. Pearce was originally tried and convicted of assault with intent to commit rape in May, 1961, after entering a plea of not guilty. He received a sentence of not less than twelve nor more than fifteen years. Pursuant to North Carolina's post-conviction procedures,¹ Pearce obtained a new trial on the ground that a constitutional error had been committed at his first trial—an involuntary confession had been admitted over his objection.²

¹ N.C.G.S. 15-217-15-222.

² *State v. Pearce*, 266 N.C. 234, 145 S.E. 2d 918 (1965).

In June, 1966, Pearce was indicted for assault with intent to commit rape and retried. After pleading not guilty, he was found guilty of this offense and sentenced to eight years imprisonment.

For illustrative purposes only, assume Pearce had served his initial sentence continuously. With no time administratively credited to his sentence³ and disregarding any periods when Pearce was released on bail awaiting retrial or appeal, he would have been eligible for release in May, 1973.⁴ Based on the same assumptions, Pearce would have been eligible for release under his second sentence in June, 1974.

In sentencing Pearce after his second conviction, the trial judge stated:

"It is the intention of this Court to give the defendant a sentence of fifteen years in the State Prison; however, it appears to the Court from the records available from the Prison Department that the defendant has served six years, six months, seventeen days, flat and gain time combined; and the Court, in passing sentence in this case, is taking into consideration the time

³ Current policies of the North Carolina Department of Corrections permit pro rata accrual of up to 150 days of good conduct time per year, subject to forfeiture for misbehavior. Additional gain time may be earned in certain job classifications.

⁴ N.C.G.S. 148-42. *Indeterminate sentences*.—The several judges of the superior court are authorized in their discretion in sentencing prisoners to imprisonment to commit the prisoner to the custody of the Commissioner of Correction for a minimum and maximum term. The maximum term imposed shall not exceed the limit otherwise prescribed by law for the offense of which the person is convicted. At any time after the prisoner has served the minimum term less earned allowances for good behavior, the Commissioner is authorized to discharge such person unconditionally or release him from confinement under conditions prescribed by the Commissioner.

already served by the defendant. It is the judgment of this Court that the defendant be confined to the State's Prison for a period of eight years." (A. 3)

In North Carolina the maximum punishment for assault with intent to commit rape is fifteen years.⁵

In voiding Pearce's second sentence, Judge Butler stated:

"The eight-year sentence petitioner received at his second trial gives him more than full credit for time served on the maximum length of the original sentence, but it does not give full credit on the minimum length of the original sentence. *Patton v. Ross*, 267 F. Supp. 387 (E.D.N.C. 1967)." (A. 4, 5)

From the viewpoint of his actual release date, by obtaining a new trial Pearce subjected himself to the possibility of at least one additional year in prison; or, in effect, he was denied credit for one of the years he had spent in prison prior to his second conviction and sentence.

The effect of Pearce's second sentence on his eligibility for parole is even more severe. The applicable North Carolina statute provides that a prisoner shall be eligible for parole when he has served a fourth of his minimum sentence.⁶ Under his first sentence, Pearce was eligible to be considered for parole after he had served a fourth of his

⁵ N.C.G.S. 14-22.

⁶ N.C.G.S. 148-58. *Time of eligibility of prisoners to have cases considered.*—All prisoners shall be eligible to have their cases considered for parole when they have served a fourth of their sentence, if their sentence is determinate, and a fourth of their minimum sentence, if their sentence is indeterminate; provided, that any prisoner serving sentence for life shall be eligible for such consideration when he has served ten years of his sentence.

minimum sentence of twelve years. This three-year period elapsed in May, 1964. Thus, Pearce was already eligible to be considered for parole when he obtained a new trial in 1965. Under his second sentence, Pearce would not have become eligible for parole until he had served a fourth of his second sentence. These two years would have been completed in June, 1968.

The North Carolina Board of Paroles construes the North Carolina Supreme Court decisions to mean that if a person is given a new trial and is resentenced, he will not be eligible for parole until he has served a fourth of this second sentence, unless the trial judge, in resentencing the defendant, states that credit for the time already served shall be given for the purposes of parole. (See Exhibit A, *infra* p. 33.) Since the trial judge supposedly gave Pearce credit for time already served in fixing his second sentence and did not mention credit for the purposes of parole, Pearce would have had again to serve the minimum period to become eligible for parole.

It should be noted that under the present policy of the North Carolina Board of Paroles, even a sentence which is not more severe in terms of the actual release date would be more severe in terms of eligibility for parole unless, in each instance, credit for parole purposes for all the time served under the invalid conviction was given at the time of the second sentence.

B. TRADITIONAL THEORIES JUSTIFYING HARSHER SENTENCES.

In North Carolina and throughout the nation the imposition of harsher sentences has customarily been justified through the use of two theories, the "void" and the "waiver" doctrines. The "void" doctrine was developed to allow re-

view of criminal cases through habeas corpus. Both theories have been employed to prevent a defendant who has been erroneously convicted, from asserting the defense of double jeopardy as a bar to reprosecution after he had secured a reversal of his original conviction.⁷ Even though these doctrines were originally used to provide a rationale for reprosecuting a defendant, the scope of their application has not been so limited and they have subsequently been used as a justification of increases in second sentences.⁸

Under the "void" doctrine, when the conviction at the first trial is overturned upon appeal or through other appropriate procedural methods, it is considered a nullity so that the sentence imposed at the first trial imposes no limitations upon the sentence which can be imposed at the second trial. The second sentencing court is therefore not obligated to consider any time served under the previous sentence in deciding on the penalty. The absurdity of using the "void" doctrine to justify an increased sentence is pointed out in *King v. United States*, 98 F.2d 291 (D.C. Cir. 1939):

"The Government's brief suggests, in the vein of *The Mikado*, that because the first sentence was void, appellant 'has served no sentence but has merely spent time in the penitentiary': that since he should not have been in prison as he was, he was not imprisoned at all. The brief deduces the corollary that his non-existent punishment cannot possibly be 'increased'. As to other corollaries, it might be suggested that he is liable in quasi-contract for the value of his board and

⁷ Whalen, *Re-sentence Without Credit for Time Served: Unequal Protection of the Laws*, 35 Minn. L. Rev. 239, 240-244 (1951).

⁸ Note, 12 Vill. L. Rev. 380 (1967).

lodging and criminally liable for obtaining them by false pretenses." 98 F.2d at 293-294.

The doctrine of waiver permits the same result. In seeking post-conviction relief, the defendant is said to waive any benefit he might have received under the prior sentence, including the lighter sentence and credit for time served. When the defendant seeks a new trial, he waives all the consequences of the prior proceeding, accepting the hazard as well as the benefits of a new trial. *State v. White*, 262 N.C. 52, 136 S.E. 2d 205 (1964), *cert. denied*, 379 U.S. 1005 (1965). Underlying this fiction of waiver is a sporting theory of justice. If a petitioner gets a new trial, then the state gets a new chance to determine a proper sentence, even if the second sentence is greater than the first. The use of the theory of waiver to erase all the protection gained by a former trial and sentence was rejected by this Court in *Green v. United States*, 355 U.S. 184 (1957).

The North Carolina Supreme Court has also justified harsher sentences by holding a defendant "assumes the risk". The court holds that when a defendant appeals his conviction he takes the risk that a heavier sentence might be imposed. *State v. Williams*, 261 N.C. 172, 134 S.E. 2d 163 (1964). The court feels that if a defendant obtains a new trial of his own request in hopes of receiving a lighter sentence or even an acquittal, he accepted the hazard of receiving a heavier sentence and this is not a denial of his constitutional rights. *State v. White, supra*.

Recent North Carolina decisions discussing increased sentences have acknowledged the harshness of applying the above theories to resentencing procedures. In *State v. Weaver*, 264 N.C. 681, 142 S.E. 2d 633 (1965), the court

quotes from *Lewis v. Commonwealth*, 329 Mass. 445, 108 N.E. 2d 922 (1952), that: "... it is not even technically correct to say that the first sentence must now be deemed to have been a nullity. It was not a nullity when it was imposed or while it was being served . . . " 264 N.C. at 685, 142 S.E. 2d at 636.

In *Weaver*, the court held that on any subsequent sentence imposed for the same conduct, a defendant must be given full credit for all time served under the previous sentence. However, the benefit of such a rule is diminished in North Carolina, since the sentence itself can be increased, so long as the second sentence plus the time served under the initial erroneous sentence do not exceed the maximum statutory sentence allowable. Where the second sentence does not exceed such limitation, an allowance of credit by the trial judge is presumed. *State v. White, supra*. If the second sentence coupled with the time already served under the first sentence exceeds the statutory maximum, then the presumption that credit has been given is rebutted, and the sentence is invalid. *State v. Weaver, supra*. The requirement for an allowance of credit does not prevent the imposition of an increased sentence at the second trial.

C. POSSIBILITY OF AN INCREASED SENTENCE IS A REALITY TO SUCCESSFUL PETITIONERS.

The problem of harsher sentences is not simply theoretical. According to an informal survey recently published,⁹ seventy percent of those defendants in North Carolina who were reconvicted and resentenced after successful post-conviction reviews were given harsher sentences. Of

⁹ Note, 1965 Duke L.J. 395, 399 n.25.

the fifty reconvicted and resentenced, forty-six had either identical or increased sentences. Thirty-two of these forty-six were not given full credit for the time served on the prior conviction. An identical sentence without full credit for time already served is a harsher sentence, since these "successful" petitioners could spend more time in prison than was possible under their original sentences.

A sentencing rule which provides the State with power to increase sentences and the application of which often results in harsher sentences raises the fear of a potential petitioner that he will be subjected to a more severe punishment simply because he has appealed or pursued his post-conviction remedies. With the possibility of an increased sentence, many petitioners have been deterred from exercising their right to petition for a new trial because of the fear of being punished for exercising that right.¹⁰

¹⁰ This fear is dramatically conveyed by a letter from a North Carolina prisoner to Judge Craven which is set out in *Patton v. North Carolina*, 256 F. Supp. 225 (W.D.N.C. 1967):

"Dear Sir:

"I am in the Mecklenburg County jail. Mr. _____ chose to retry me as I knew he would . . .

"Sir the other defendant in this case was set free after serving fifteen months of his sentence. I have served 34 months and now am to be tried again and with all probability [sic] I will receive a heavier sentence then [sic] before as you know sir my sentence at the first trile [sic] was 20 to 30 years. I know it is usually [sic] the courts prosedure [sic] to give a larger sentence when a new trile [sic] is granted I guess this is to discourage Petitioners.

"Your Honor, I don't want a new trile [sic] I am afraid of more time . . .

"Your Honor, I know you have tried to help and God knows I appreciate [sic] this but please sir don't let the state re-try me if there is any way you can prevent it." 256 F. Supp. at 231, n. 7.

There is some evidence that this repressive attitude exists nationwide. "The only hope for straightening things out is to give some Gideonite a new trial and reconvict him," said a Clerk of Court in Escambia County, Florida, "if we give him a heavier sentence than he got the first time, maybe that will serve as a lesson to others." *Time Magazine*, Oct. 18, 1963, p. 53. A trial judge in Delaware County, Pennsylvania, denying a defendant credit for over three years of time already served under an invalidated sentence said: "This is the risk these prisoners take when they seek to take advantage of new legal interpretations." Delaware County (Pa.) Daily News, March 25, 1965, § 2, p. 1.¹¹

Pearce's second sentence was declared unconstitutional in an order (A. 4) based on the decision in *Patton v. North Carolina*, 381 F.2d 636 (4th Cir. 1967), cert. denied, 390 U.S. 905 (1968). (Hereinafter sometimes referred to as *Patton*.)

In *Patton*, the defendant had been tried for armed robbery in October, 1960. He was unrepresented by counsel and entered a plea of nolo contendere at the close of the state's evidence. He was convicted, receiving a sentence of twenty years. Based on the denial of his constitutional right to counsel at the first trial, he was awarded a new trial which took place in February, 1965. Represented by counsel at his second trial, Patton pleaded not guilty and was convicted by the jury on the original indictment charging armed robbery. The trial court purported to give Patton credit for the nearly five years served on the original twenty years sentence, and then sentenced him to twenty

¹¹ ABA Standards, *Post-Conviction Remedies*, 95 (tent. draft, Jan. 1967).

years imprisonment. After the second trial, Patton applied to the federal district court for a writ of habeas corpus. This writ was granted in *Patton v. North Carolina*, 256 F. Supp. 225 (W.D.N.C. 1966). This decision was affirmed in the comprehensive opinion by Judge Sobeloff in *Patton v. North Carolina*, 381 F.2d 636 (4th Cir. 1967), *cert. denied*, 390 U.S. 905 (1968).

Patton was the first decision to examine thoroughly the constitutional objections to harsher sentences on retrial, finding that such were violative of three portions of the United States Constitution: the Due Process and Equal Protection Clauses of the Fourteenth Amendment and the Double Jeopardy Clause of the Fifth Amendment.

D. DUE PROCESS IS OFFENDED BY RESTRICTIONS PLACED ON DEFENDANT'S ACCESS TO POST-CONVICTION RELIEF.

In *Patton*, the court first recognized that the traditional justifications of increased sentences—the “void” and the “waiver” doctrines—were offensive to the Due Process Clause of the Fourteenth Amendment:

“North Carolina deprives the accused of the constitutional right to a fair trial, then dares him to assert his right by threatening him with the risk of a longer sentence. It may not exact this price. The enjoyment of a benefit or protection provided by law cannot be conditioned upon the ‘waiver’ of a constitutional right.”
381 F.2d at 640.

The court implicitly held that the harsher sentences possible under the North Carolina rule violated the “unconstitutional conditions” doctrine. Under this doctrine, a state may not condition the receipt of a state-provided benefit

upon the waiver or limitation of a constitutional right.¹² The benefit provided under this theory is the immunity from an increase in sentence. The constitutional right being limited or waived is the constitutional right to a fair trial which includes unfettered access to existing post-conviction remedies.

The doctrine of unconstitutional conditions is well established and should prevent the state from compelling a defendant to make a choice between increased sentence immunity and a fair trial. The doctrine has often been applied to situations where the state has offered to extend a benefit or has threatened punishment in exchange for the surrender of certain constitutional rights. If a person refused to surrender his constitutional rights, then the state would deny him the benefit accorded to others or inflict the threatened sanctions.¹³

As it applies to harsher sentencing, the orthodox unconstitutional conditions doctrine might be stated in reverse. The defendant must waive a state-conferred benefit, his immunity from an increased sentence, in order to secure his constitutional right to a fair trial by pursuing his post-conviction remedies. Whether stated in conventional or inverted terms, the violation of due process remains the same.

The benefit conferred by the State on Pearce was immunity from having his sentence increased. In North Caro-

¹² Note, *Unconstitutional Conditions*, 73 Harv. L. Rev. 1595 (1960).

¹³ *Spevack v. Klein*, 385 U.S. 511 (1967); *Lamont v. Postmaster General*, 381 U.S. 301 (1965); *Griffin v. California*, 380 U.S. 609 (1965); *Sherbert v. Verner*, 374 U.S. 398 (1963). Van Alstyne, *In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant*, 74 Yale L.J. 606, 614 (1965).

lina there can be no increase in the defendant's sentence after the term of the trial court has expired and the defendant has begun serving his sentence. *State v. Lawrence*, 264 N.C. 220, 141 S.E. 2d 264 (1965); *State v. McLamb*, 203 N.C. 442, 166 S.E. 507 (1932). Therefore, if Pearce had remained in jail and had not sought post-conviction relief, he would have been assured that his sentence would not be increased. He was guaranteed that the time he served would be credited in determining his release date and eligibility for parole.

To obtain this immunity from an increased sentence, a defendant must forego his right to seek a fair trial unblemished by constitutional defects. He is foreclosed from using the existing post-conviction avenues to correct any constitutional defects in his trial. To seek successfully post-conviction relief is to expose oneself to the possibility of a harsher sentence. This is analogous to both the "credible dilemma" in *Green v. United States*, 355 U.S. 184 (1957), and the "grisly choice" in *Fay v. Noia*, 372 U.S. 391 (1963), both of which were denounced by the Court.

Freedom of access to post-conviction machinery for the purpose of correcting constitutional defects in a former trial is a fundamental part of the right to a fair trial. To impair a defendant's access to post-conviction remedies is in itself a violation of due process.

The right to a fair trial free of constitutional defects is a fundamental feature of the Due Process Clauses of the Fifth and Fourteenth Amendments which can only be secured if access to existing methods of review are unimpaired. The only justification for imposing a condition

upon the enjoyment of a state-provided benefit is where there is evidenced some compelling societal interest. Certainly restricting the correction of constitutionally defective trials is not in the public interest. "Since the state has no interest in preserving erroneous judgments, it has no interest in foreclosing appeals therefrom by imposing unreasonable conditions on the right to appeal." *People v. Henderson*, 60 Cal. 2d 482, 386 P.2d 677 (1963). The rationale is equally applicable to any method of post-conviction review.¹⁴

The fact that the right of appeal is guaranteed in North Carolina is affirmed in *State v. Stafford*, No. 495 (Fall Term 1968, Supreme Court of North Carolina, Dec. 9, 1968) 274 N.C. —, — S.E. 2d — (1968):

"In North Carolina, an aggrieved party has the absolute and unfettered right to appeal; and this Court has been alert to protect this right. In *State v. Arthur Patton, Jr.*, 221 N.C. 117, 19 S.E. 2d 142, the records disclosed that when a defendant gave notice of appeal from a fine of \$35.00, the trial judge struck that judgment and imposed a prison sentence of ninety days. In remanding the case for resentence, Devin, J. (later C.J.), said: '[i]t seems here, under the circumstances described in the record, the action of the judge was induced by the defendant's expression of his intention to appeal. This tended to impose a penalty upon the defendant's right to appeal and to affect the exercise of his right to do so. . . . this right ought not to be denied or abridged; nor should the attempt to exercise the

¹⁴ On the sufficiency of other possible justifications see Van Alstyne, *supra* at 617-623.

right impose upon the defendant an additional penalty or the enlargement of his sentence.' " 274 N.C. at —.

The correction of constitutional defects through established post-conviction procedures in North Carolina should not be distinguished from a defendant's right of appeal. Both should be judiciously protected from abuse.

Once the state establishes procedures for post-conviction review, these procedures must be open and accessible to all. In *Rinaldi v. Yeager*, 384 U.S. 305 (1966), the Court was concerned with a New Jersey statute which provided that a petitioner pay for a transcript of his trial court proceedings from his pay for his prison work. In finding that the statute violated the Equal Protection Clause, Justice Stewart reiterated this Court's concern with open access to post-conviction review:

"This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts. *Griffin v. Illinois*, 351 U.S. 12; *Douglas v. California*, 372 U.S. 353; *Lane v. Brown*, 372 U.S. 477; *Draper v. Washington*, 372 U.S. 487." 384 U.S. at 310.

As early as 1882, this Court articulated its concern with unfettered access to post-conviction remedies. *Kring v. Missouri*, 107 U.S. 221 (1882).

In *Griffin v. Illinois*, 351 U.S. 12 (1956), this Court held that a state may not grant appellate review in such a way as to discriminate against some convicted defendants be-

cause of their poverty and provided that the state must furnish a defendant with a free transcript on appeal.

In four cases, all decided on March 18, 1963, this Court amplified the constitutional requirement of unimpaired access to appellate and post-conviction relief. *Douglas v. California*, 372 U.S. 353 (1963), provided that the state must furnish counsel on appeal for indigent defendants. In *Lane v. Brown*, 372 U.S. 477 (1963), the right of indigent defendants to a free transcript and counsel on appeal was affirmed. *Draper v. Washington*, 372 U.S. 487 (1963), assured adequate appellate review for indigents by providing for an impartial method of obtaining free transcripts. In *Fay v. Noia*, *supra*, this Court provided for access to federal habeas corpus relief unencumbered by a restrictive interpretation of the requirement for exhaustion of state remedies.

Continuing interest in this problem is exhibited by the dissenting opinions of Justice Fortas in *United States v. Ewell*, 383 U.S. 116, 128-129 (1966), and *Cichos v. Indiana*, 385 U.S. 76, 80-82 (1966).

Other recent decisions examining this problem have held that such a practice unnecessarily restricts the defendant's right of review. *Marano v. United States*, 374 F.2d 583 (1st Cir. 1967). *Marano* relied on an earlier decision, *Worcester v. Commissioner*, 370 F.2d 713 (1st Cir. 1966), where the court held that a district judge was without power to offer the defendant a suspended sentence on condition that he not appeal. The court stated that the lower court could not

"put a price on an appeal. The defendant's exercise or right to appeal must be free and unfettered . . .

[I]t is unfair to use the great power given to the court to determine sentence to place a defendant in the dilemma of making an unfree choice." 370 F.2d at 718.

The holding in *People v. Henderson, supra*, that an increased punishment is unconstitutional was based primarily on double jeopardy grounds, but the court noted that the right of appeal from an erroneous judgment is unreasonably impaired by the threat of harsher punishment.

The theory that harsher punishment impairs the right of appeal was the principal justification for the New Jersey Supreme Court's holding unconstitutional a sentence increased from life to death on retrial. *State v. Wolf*, 46 N.J. 301, 216 A.2d 586 (1966). The ruling was grounded on standards of procedural fairness which prohibited the infliction of a heavier sentence at retrial. These standards of procedural fairness did not permit the restriction of the right to appeal by requiring the defendant to barter with his wife for the opportunity of exercising his right to appeal.

The possibility of a harsher sentence for every defendant who successfully overturns his first conviction must necessarily chill his right to seek correction of constitutional defects in his first trial. Even though post-conviction procedures exist to secure a fair trial, the defendant may not choose to follow the procedures if he fears that he will be punished for doing so. Such a procedure, as it exists in North Carolina, violates not only the unconstitutional conditions doctrine but general concepts of due process. It is fundamentally unfair to establish procedures aimed at guaranteeing a trial free from constitutional defects, and then to restrict the use of such procedures by threatening a successful defendant with a more severe sentence.

This Court has not hesitated to protect the assertion of constitutional rights. In *United States v. Jackson*, 390 U.S. 570 (1968), the defendants were indicted under the Federal Kidnapping Act, 18 U.S.C. § 1201 (1965), under which a plea of guilty and waiver of jury trial assured the defendants that the death penalty would not be imposed. On the other hand, a plea of not guilty and the request for a jury trial could result in the imposition of the death penalty if the defendants were found guilty and the jury so recommended. Under this statutory scheme, the possibility of the death penalty existed only for those who contested their guilt before a jury. This was found unconstitutional since its effect was to "chill the assertion of constitutional rights by penalizing those who chose to exercise them." 390 U.S. at 581. In much the same manner, threat of a harsher sentence chills the assertion of a defendant's right to a fair trial by effectively denying him access to post-conviction remedies.

E. ARBITRARY CLASSIFICATION OF PERSONS EXPOSED TO HARSHER SENTENCES DENIES EQUAL PROTECTION.

Under the Equal Protection Clause, arbitrary classifications by states in the application of their laws are prohibited. Treatment among different classes of defendants can be different, but the distinction made between these classes must rest on a rational foundation. *Loving v. Virginia*, 388 U.S. 1 (1967); *Griffin v. Illinois*, *supra*; *Truax v. Raich*, 239 U.S. 33 (1915). As stated previously, in North Carolina there can be no increase in a defendant's sentence after the term of the trial court has expired and the defendant has begun serving his sentence. *State v. Lawrence*, *supra*. Even so, North Carolina may not be pro-

hibited under the Equal Protection Clause from establishing a system of sentence review which might include the upward revision of sentences. However, North Carolina has enacted no legislation providing for sentence review, which shows that the legislature has not considered a review of sentences to be of compelling state interest. *Gainey v. Turner*, 266 F. Supp. 95 (E.D.N.C. 1967).

Since a sentence cannot be increased after a defendant has commenced to serve it and there is no legislative provision for the modification of sentences, the risk of a harsher sentence falls on only one class of defendants, those who successfully seek appellate or post-conviction relief. The state should not be allowed arbitrarily to expose only those who have previously been subjected to an erroneous conviction to the risk of a harsher sentence.

The only justification for an increase in a sentence is that the original sentence was too light, either because the first judgment was too lenient or because new facts have been presented. However, in North Carolina the only class of persons who are vulnerable to this argument are those who have exercised their right to challenge their convictions. There is no reason to suppose that there exists any rational relationship between this group and those prisoners who indeed might deserve an increased sentence. There is no evidence that these successful petitioners for a new trial were treated any more leniently at the initial trial than prisoners who chose not to assert their right to a new trial or had no grounds to do so.

The only distinctive feature of the class subjected to the risk of harsher punishment is not the fact that they alone might have originally received too light a sentence,

but that they were originally denied a fair trial. This is certainly no justification for treating them more harshly.

The Equal Protection Clause is further offended by unfair discrimination in the class of persons who might pursue their post-conviction remedies. A harsher sentence on retrial will not, in North Carolina, deter those who have received the statutory maximum at their first trial, since their sentences cannot be increased. *State v. Weaver, supra*. Also, those defendants convicted of minor crimes will be more inclined to seek post-conviction review than those convicted of major crimes because trial judges have broader sentencing discretion in the latter. Finally, the prisoners who have served the most time on their initial sentence will be deterred from seeking post-conviction review since they have the most to lose by a denial of credit for time already served.¹⁵

The State's brief argues that there is no arbitrary classification within the class which seeks to appeal since all defendants exercising their right to appeal are subject to a potentially harsher sentence and all stand on equal footing in their separate appeals. This argument can be effectively countered by this Court's discussion in *Rinaldi v. Yeager, supra*:

"The Equal Protection Clause requires more of a state law than non-discriminatory application within the class it establishes. *McLaughlin v. Florida*, 379 U.S. 184, 189-190. It also imposes a requirement of some rationality in the nature of the class singled out. To be sure, that constitutional demand is not a demand that a statute necessarily apply equally to all persons.

¹⁵ Note, 80 Harv. L. Rev. 891 (1967).

'The Constitution does not require things which are different in fact . . . to be treated in law as though they were the same.' *Tigner v. Texas*, 310 U.S. 141. Hence, legislation may impose special burdens upon defined classes in order to achieve permissible ends. But the Equal Protection Clause does require that, in defining a class subject to legislation, the distinctions that are drawn have 'some relevance to the purpose for which the classification is made.'" 384 U.S. at 308-309 (citations omitted).

It is noted that in the present situation the class is defined not by legislation but by judicial decisions. However, the requirement still exists that the distinctions have some relevance to the purposes for which the classification is made. As pointed out above, the distinction that a defendant initially received an unfair trial does not justify the threat of a harsher sentence.

F. DOUBLE JEOPARDY PROTECTIONS AGAINST MULTIPLE PUNISHMENTS AND REPROSECUTION AFTER ACQUITTAL ARE VIOLATED BY INCREASED SENTENCES.

It is recognized that this Court has not yet explicitly held that the Double Jeopardy Clause of the Fifth Amendment is applicable to the states through the Due Process Clause of the Fourteenth Amendment. See *Palko v. Connecticut*, 302 U.S. 319 (1937). In *Patton*, the court, relying on the reasoning in *United States ex rel. Hentenry v. Wilkins*, 348 F.2d 844 (2nd Cir. 1965), cert. denied sub nom. *Mancusi v. Hetenyi*, 383 U.S. 913 (1966), concluded that the Double Jeopardy Clause is applicable to the states because the basic core of the double jeopardy guarantees are as fundamental as those other guarantees of the Bill of Rights

which have been absorbed into the Due Process Clause of the Fourteenth Amendment by this Court. Moreover, this precise issue is before the Court in *Benton v. Maryland* (No. 201 October Term, 1968), argued December 12, 1968. A decision dealing with the merits of the issue in that case would necessarily be controlling on that issue in this case.

Assuming the Double Jeopardy Clause is applicable to the states, two interpretations of the Double Jeopardy Clause lend support to the fact that harsher sentences cannot be imposed by the states.

Since 1872, the Double Jeopardy Clause has been interpreted to prohibit multiple punishments for the same offense. In *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1873), the accused was given a sentence of imprisonment and fined. The defendant paid the fine before it was discovered that the statute provided for either imprisonment or fine, not both. Since the defendant had already paid the fine, this Court held that he was to be released immediately from prison since no man can be twice lawfully punished for the same offense.

This prohibition against multiple punishments was affirmed in *United States v. Benz*, 282 U.S. 304 (1931), where defendant's ten months' sentence was reduced to six months. This Court upheld the reduction but noted in a dictum statement that the sentencing court would have been powerless to increase the sentence since to do so would have subjected the defendant to double punishment for the same offense, a violation of the Double Jeopardy Clause. See *United States v. Adams*, 362 F.2d 210 (6th Cir. 1966) and *United States v. Sacco*, 367 F.2d 368 (2nd Cir. 1966).

In each of the above cases, the proposed sentence increase took place after the defendant had commenced to

serve his sentence and did not involve a new trial and a resentence. However, as stated in *Patton*, there should be no constitutionally significant distinction between the increases prohibited in those cases and increases in punishment following retrial. It should not matter whether the second sentence was imposed because of an error committed by the sentencing judge resulting simply in a resentence or because of an error committed in the trial resulting in a reversal and a new trial. This prohibition against multiple punishments provided by the Double Jeopardy Clause is applicable to defendants such as Pearce unless he is considered to have waived this double jeopardy protection. As stated in *Patton v. North Carolina, supra*, at 645-646, such a waiver is completely unrealistic and offends due process.

The second protection of the Double Jeopardy Clause applicable to Pearce is the protection from reprosecution after an acquittal. In *Green v. United States, supra*, the defendant was tried on an indictment charging murder. He was found guilty of second degree murder and sentenced to a term of imprisonment. The jury verdict was silent as to first degree murder. On appeal the second degree murder conviction was reversed. The defendant was retried on the same indictment, the verdict being first degree murder. Green was sentenced to death.

This Court in reversing, held the conviction violated the double jeopardy protection against reprosecution after acquittal. The Court decided the initial conviction for second degree murder was an implied acquittal of any higher degree of the same crime (first degree murder). Green could have lawfully been reprosecuted for second degree murder, but no higher degree of that crime.

The government argued that the defendant had waived his right to protection against double jeopardy by pursuing appellate relief. However, the Court rejected this argument and pointed out that the defendant had no meaningful choice:

"Conditioning an appeal of one offense on a coerced surrender of a valid plea of former jeopardy on another offense exacts a forfeiture in plain conflict with the constitutional bar against double jeopardy." 355 U.S. at 192.

The rejection of the waiver argument in this factual situation is equally applicable to the rejection of the waiver argument in all situations involving harsher sentencing.

Applied to the facts in the instant case, the "implied acquittal" doctrine should be extended to hold that a defendant is impliedly acquitted of any sentence greater than the sentence he received at his first trial.¹⁶ This "implied acquittal" theory was applied in *People v. Henderson*, *supra*, to overturn a harsher sentence (death) received by a defendant who had successfully challenged his first conviction and sentence of life imprisonment. The theory of *Henderson* has been followed in later California cases to restrict the imposition of harsher prison sentences at a second trial. *People v. Ali*, 57 Cal. Rptr. 348, 424 P.2d 932 (1967); *In re Ferguson*, 233 Cal. App. 2d 79, 43 Cal. Rptr. 325 (1965).

The State has relied heavily upon two former decisions of this Court, which seem on their face to uphold a harsher sentence on retrial. However, the decision in both cases can be distinguished from the situation in the instant case.

¹⁶ Van Alstyne, *supra* at 635.

In *Murphy v. Massachusetts*, 177 U.S. 155 (1900), the defendant was sentenced under the Massachusetts indeterminate sentence statute to a term of not less than ten and no more than fifteen years. The statute creating indeterminate sentences had been passed after the commission of the offense for which the defendant was tried. On motion of the defendant, the sentence was reversed upon the grounds that the statute authorizing such indeterminate sentences should not relate to past offense. The defendant was not retried, but merely resentenced to a specific term of twelve years, six months, with the time he had already served being credited to this sentence; leaving a total sentence in excess of nine years to be served. Under his first sentence the defendant could have been released in 1906. Under the second sentence, his release would not have occurred until 1908.

Even though Murphy's second sentence was harsher, this fact did not form the basis of the double jeopardy argument which was made. Murphy contended that to resentence him at all after he had commenced serving his first sentence was a violation of the prohibition against double jeopardy. Even though the factual situations are analogous, *Murphy* should not be viewed as precedent for allowing harsher sentences, since this case merely stood for the fact that *Murphy* could be resentenced even though he had commenced serving his initial sentence. This Court held that plea of former jeopardy or former conviction cannot be maintained because of service of part of the sentence reversed or vacated on the prisoner's own application.

In *Stroud v. United States*, 251 U.S. 15 (1919), defendant was convicted of murder in the first degree in May, 1916, and was sentenced to death. This was reversed and

he was tried again in May, 1917, and sentenced to life imprisonment. This sentence was reversed and in a third trial, Stroud was found guilty of murder in the first degree and sentenced to death. Stroud argued that the last trial of the case had, in effect, put him in double jeopardy. This Court, in upholding the death sentence, stated the defendant had not been placed in double jeopardy within the meaning of the Constitution, since the defendant himself had invoked the action of the court which resulted in a new trial. In *Stroud*, the defendant was also arguing that the Double Jeopardy Clause prevented reprosecution. A close reading of this decision does not indicate that any of the arguments against harsher sentencing were made to the Court.

Both *Murphy* and *Stroud* stand only for the long accepted principle that the Double Jeopardy Clause does not absolutely prohibit reprosecution. *United States v. Ball*, 163 U.S. 662 (1896). The problems and constitutional issues raised by this case were not raised in either *Murphy* or *Stroud*, and these decisions should not be binding on this question. When comparable arguments were raised in *Green*, this Court held that double jeopardy was applicable and a defendant should not have to waive a constitutional right in order to correct an erroneous conviction.

G. PROHIBITION AGAINST ALL INCREASED SENTENCES IS THE ONLY PROTECTION AGAINST THE APPEARANCE OF IMPROPER MOTIVATION.

The State has argued that the flat rule in *Patton* prohibiting all harsher sentences should be tempered with the exception that such harsher sentences would be allowed if justified. Even with such an exception, no justification

exists for the harsher sentence received by Pearce. The North Carolina Supreme Court acknowledged that the evidence at his second trial was essentially the same as the evidence presented at his first. *State v. Pearce*, 268 N.C. 707, 151 S.E. 2d 571 (1966).

To allow an increased sentence to be justified would necessitate a factual inquiry in every case to determine the motivation of the judge or jury who imposed the second sentence. A judge motivated by a desire to punish the defendant and deter such appeals could not be expected to announce it. If harsher sentences could be justified, then improper motivation would be possible. It is not contended that every harsher sentence is the product of an improper motivation, but the problem which exists under a rule allowing harsher sentences is well stated in *Patton*:

"It is equally impossible and more distasteful, for federal courts to pry into the sentencing judge's motivation to ascertain whether vindictiveness play a part . . . [I]mproper motivation is characteristically a force of low visibility. In order to prevent abuses, the fixed policy must necessarily be that the new sentence shall not exceed the old. Seldom will this policy result in inadequate punishment. Against the rare possibility of inadequacy, greater weight must be given to the danger inherited in a system permitting stiffer sentences on retrial—that the added punishment was in reaction to the defendant's temerity in attacking the original conviction. Even the *appearance* of improper motivation is a disservice to the administration of justice." (Emphasis the Court's) 381 F.2d at 641.

The effect of this policy is to place a ceiling on resentencing. The original sentence will act as a maximum limi-

tation on any sentence that may subsequently be given at a new trial. In this way, the defendant is free to appeal or to pursue his post-conviction remedies without fear of having a harsher punishment imposed if he is successful in attacking his original conviction. This rule already exists in the United States Military, Uniform Code of Military Justice, 10 U.S.C. § 863 (1965), and has been proposed by the ABA Advisory Committee on Sentencing and Review in *ABA Standards, Post-Conviction Remedies*, § 6.3 (tent. draft, Jan., 1967),¹⁷ and *ABA Standards, Sentencing Alternatives and Procedures*, § 3.8 (tent. draft, Dec., 1967).¹⁸

The rule against increased sentences has also been adopted in comprehensive opinions by the Oregon and Minnesota Supreme Courts. *State v. Turner*, 429 P. 2d 565 (Ore. 1967) and *State v. Holmes*, 161 N.W. 2d 650 (Minn. 1968).

¹⁷ § 6.3 Sentence on reprosecution of successful applicants; credit for time served.

(a) Where prosecution is initiated or resumed against an applicant who has successfully sought post-conviction relief and a conviction is obtained, or where a sentence has been set aside as the result of a successful application for post-conviction relief and the defendant is to be resentenced, the sentencing court should not be empowered to impose a more severe penalty than that originally imposed.

(b) Credit should be given towards service of the minimum and maximum term of any new prison sentence for time served under a sentence which has been successfully challenged in a post-conviction proceeding.

¹⁸ § 3.8 Resentences.

Where a conviction or sentence has been set aside on direct or collateral attack, the legislature should prohibit a new sentence for the same offense or a different offense based on the same conduct which is more severe than the prior sentence less time already served.

Conclusion

Based on the foregoing reasons, an increased sentence denies both due process and equal protection as guaranteed by the Fourteenth Amendment and violates the Double Jeopardy Clause of the Fifth Amendment. Consequently, the Judgment of the United States Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted,

LARRY B. SITTON

Counsel for Respondent

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EXHIBIT A



State of North Carolina
Office of The Board of Paroles

DAN K. MOORE
GOVERNOR
MARVIN R. WOOTEN
CHAIRMAN

331 West Morgan Street

Raleigh 27602

December 16, 1968

HOWARD HEPLER
MEMBER
WADE E. BROWN
MEMBER
FOIL ESBICK
ADMINISTRATIVE ASSISTANT

Mr. Larry B. Sitton
Attorney at Law
Greensboro, North Carolina

Re: Pearce v. North Carolina

Dear Mr. Sitton:

I am pleased to reply to your letter of December 12, 1968, regarding eligibility for parole consideration.

Assuming that the original sentence of a defendant has been set aside as a result of a successful application for post conviction relief and the defendant is resentenced, the defendant is not given credit for the time served under the invalid sentence for the purpose of parole consideration, unless ordered by the sentencing court, and therefore must serve the minimum period required under law before becoming eligible for parole consideration.

The above is the established rule and policy of the Board of Paroles established in accord with the statutes creating this Board and the status of court decisions at this time.

Very truly yours,

Marvin R. Wooten

MRW/nw

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SUPREME COURT, U. S.

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JAN 29 1969

IN THE SUPREME COURT OF THE UNITED STATES DAVIS, CLERK

OCTOBER TERM, 1968

No. 418

**CURTIS M. SIMPSON, Warden, Kilby Prison,
Montgomery, Alabama,**

Petitioner,

vs.

WILLIAM S. RICE,

Respondent.

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

BRIEF FOR THE RESPONDENT

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vs.

WILLIAM S. RICE,

Respondent.

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

BRIEF FOR THE RESPONDENT

Constitutional Provisions Involved

The Fifth Amendment to the Constitution of the United States provides in part:

“... nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself ...”

The Sixth Amendment to the Constitution of the United States provides in part:

“In all criminal prosecutions, the accused shall enjoy the right to a speedy ... trial ...”

The Eighth Amendment to the Constitution of the United States provides:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Section 1 of the Thirteenth Amendment to the Constitution of the United States provides:

"Neither slavery nor involuntary servitude, except as a punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides in part:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Questions Presented

I.

When constitutionally defective sentences are set aside on post-conviction review and Respondent is re-tried and convicted on the same charges, may the State of Alabama punish Respondent for having exercised his post-conviction right of review and for having the original sentences declared unconstitutional by subjecting him to a punishment three times greater than originally imposed?

II.

When Respondent serves two years, six months, and twelve days on sentences thereafter vacated because of a State Court constitutional error at the original trials, may the State of Alabama, upon Respondent's being re-tried and convicted on the same charges, increase his sentences threefold and deny him credit on such sentences for time previously served?

Statement of the Case

The statement of the case as contained in Petitioner's brief is substantially correct, but fails to refer to certain portions of the Appendix which Respondent feels relevant to the questions presented.

Only two persons testified at the hearing below. They were the Respondent, William S. Rice (A. 96-113), and Respondent's witness, M. S. Dean, Record Clerk for the Alabama State Board of Corrections (A. 75-96).

Respondent, William S. Rice, testified that to his knowledge he was the first prisoner to file *coram nobis* proceedings in the Circuit Court of Pike County, Alabama, after the *Gideon* and *Escobedo* decisions rendered by this Court (A. 99) and that the same judge who first sentenced him upon his pleas of guilty later set the convictions aside and imposed the threefold greater sentences upon him after re-trial (A. 97). Respondent testified that he knew of no additional evidence to which the State had access on second trial which was not available upon his first convictions (A. 99) or of any other explanation for the increase in his sentences and the denial of credit on his new sentences for the two and one-half years already served (A. 102-103).

Mr. M. S. Dean testified that a state prisoner who has the first of several consecutive sentences set aside is given credit on his next valid sentence for time actually served on the vacated sentence, but that there is "no way" to give credit to a prisoner who has all of his convictions vacated and is then resentenced on the same charges (A. 94). He admitted that his department had not given Respondent Rice any kind of credit on his later sentences for the two and one-half years already served (A. 96).

No witnesses were called by Petitioner (A. 113). The Assistant Attorney General merely pointed out that the first sentences were on pleas of guilty while the last sentences were imposed after trials on pleas of not guilty (A. 87), and referred the Court to Exhibit "F" of Petitioner's Return and Answer, an affidavit of the Pike County Solicitor which is set out in part on page 3 of Petitioner's brief (A. 55, 89). The District Court apparently did not consider the affidavit competent or sufficient evidence to support Petitioner's contention that one of the cases against Respondent was nol-prossed in order to compensate him for time he had already served (A. 70-71).

The District Court found, from evidence which it characterized as uncontroverted, that the Respondent was given no credit for the two years, six months and twelve days he had served on Case No. 6427, either when resentenced on that case or when resentenced on the other two cases which were retried (A. 61-62). It specifically found that Case No. 6429 was nol-prossed, not in order to compensate Respondent for prior time served, but "for some reason other than a sympathetic one toward Rice" (A. 70-71). The District Court also noted that Petitioner had offered no

evidence attempting to justify the over threefold increase in sentences upon retrial, and found as follows:

"Under the evidence in this case, the conclusion is inescapable that the State of Alabama is punishing petitioner Rice for his having exercised his post-conviction right of review and for having the original sentences declared unconstitutional" (A. 69).

Summary of Arguments

I.

The imposition of greater sentences upon Respondent on his second trials for the same offenses after his original sentences were vacated for constitutional error was unconstitutional in that it violated the Due Process and Equal Protection provisions of the Fourteenth Amendment and the Double Jeopardy clause of the Fifth Amendment.

A. INCREASED SENTENCE IS A DENIAL OF DUE PROCESS.

It is a denial of due process for the State of Alabama to punish a defendant for having exercised his post-conviction right of review, or to condition his right of post-conviction review upon his assuming a risk of harsher punishment if his original sentence is declared constitutionally defective.

B. INCREASED SENTENCE IS A DENIAL OF EQUAL PROTECTION.

It is a denial of Equal Protection to unjustly discriminate against those defendants who successfully seek post-conviction relief by exposing that class of persons to the risk of an increased sentence where, as in Alabama, there can

be no increase in sentence of those persons who do not seek relief.

C. INCREASED SENTENCE PLACES A DEFENDANT IN DOUBLE JEOPARDY.

An increased sentence on retrial subjects a defendant to multiple punishment for the same offense in violation of the Double Jeopardy clause, and fails to recognize that the judge who imposed the first sentence had selected a punishment to fit the crime and had impliedly acquitted the defendant of criminal conduct requiring any greater sentence.

II.

Failure of the State of Alabama to give Respondent credit on new valid sentences for time served under prior invalid sentences for the same offenses was unconstitutional in that it violated the Due Process and Equal Protection provisions of the Fourteenth Amendment, the Double Jeopardy clause of the Fifth Amendment, the Thirteenth Amendment's prohibition against involuntary servitude and the Eighth Amendment's prohibition against cruel and unusual punishment, and denied Respondent the right to a speedy trial secured to him by the Seventh Amendment.

A. DENIAL OF CREDIT IS A DENIAL OF DUE PROCESS.

It is fundamentally unfair and shocking to the public conscience for the State of Alabama to deny credit to a defendant sentenced on retrial for time served under a prior invalid conviction for the same offense. It is also a denial of Due Process to condition a defendant's right of post-conviction review upon his relinquishment of prior time served in the event he obtains a new trial.

B. DENIAL OF CREDIT IS A DENIAL OF EQUAL PROTECTION.

It is a denial of equal protection of law to unjustly discriminate against those defendants who successfully seek post-conviction review by denying them credit for time actually served in prison if they are subsequently convicted of the same offense, where those prisoners who elect not to seek post-conviction relief are given credit for time actually served. Those prisoners who are able to make bond pending the outcome of such review are not required to suffer imprisonment, and those prisoners who have one of several consecutive sentences set aside are given credit on the valid sentences for time served on the void sentence.

C. DENIAL OF CREDIT PLACES A DEFENDANT IN DOUBLE JEOPARDY.

A defendant who, upon resentencing, is not given credit for prior time served in the same case is subjected to multiple punishment for that single offense in violation of the Double Jeopardy clause.

D. DENIAL OF CREDIT SUBJECTS A DEFENDANT TO INVOLUNTARY SERVITUDE.

Where a defendant is denied credit, upon resentencing, for prior time served in the same case, under the theory that once the original conviction was set aside the State may refuse to recognize the incidents of that conviction and may ignore the time served, the time which defendant served was not as punishment for a crime of which he had been duly convicted, and his prior incarceration by the State amounts to involuntary servitude which is forbidden by the Thirteenth Amendment.

E. DENIAL OF CREDIT IS CRUEL AND UNUSUAL PUNISHMENT.

The denial, upon resentencing, for prior time actually served by a defendant in the same case, is so completely arbitrary and shocking to the sense of justice as to constitute cruel and unusual punishment, the collective punishment being greatly disproportionate to the offense committed.

F. DENIAL OF CREDIT IS A DENIAL OF DEFENDANT'S RIGHT TO A SPEEDY TRIAL.

Where, upon retrial and resentencing after a prior conviction for the same offense has been vacated for constitutional error, the State refuses to recognize the existence of the prior conviction and the time served by the defendant under that conviction, the defendant may logically reply that, the State having no explanation for the delay which existed between defendant's arrest and his valid conviction, he has been denied the right to a speedy trial.

ARGUMENT

I.

The Imposition of Greater Sentences Upon Respondent on His Second Trials for the Same Offenses After His Original Sentences Were Vacated for Constitutional Error Was Unconstitutional in That It Violated the Due Process and Equal Protection Provisions of the Fourteenth Amendment and the Double Jeopardy Clause of the Fifth Amendment.

A. INCREASED SENTENCE IS A DENIAL OF DUE PROCESS.

Petitioner, both in its petition and in its brief, has completely failed to set forth the main basis for the holdings and opinions of the Courts below. The District Court found from the evidence that Respondent has been given greater sentences on the retrials of his cases *as punishment* for his having exercised his post-conviction right of review and having caused his original convictions to be set aside (A. 69). It seems hardly necessary to point out that such action by the State of Alabama is a denial of due process and runs counter to the most elemental concepts of justice. *Short v. United States*, 344 F.2d 550 (D.C. Cir. 1965).

Petitioner argues that "a defendant, in obtaining a new trial, assumes the risk of a more severe sentence than was first imposed . . ." The idea that in pursuing a new and fair trial a defendant consents to the possibility—or likelihood—of harsher punishment if again convicted is a cruel fiction. The unfairness of this proposition becomes glaringly apparent when one considers that it was the State's initial failure to give him a fair trial which created the situation, yet it is the defendant who the State would have

"assume the risk" of increased punishment with no credit for time served if he seeks what was denied him in the first instance. This conditioning of the right of post-conviction review upon an assumption of the risk of more severe sentence at a subsequent trial is no less unreasonable than punishing a defendant for seeking a new trial. It withholds from a defendant his constitutional right to a fair trial, which the State had denied him, unless the defendant agrees to waive his immunity from an increase in his sentence. The effect of such an "unconstitutional condition" is to inhibit a person wrongfully tried by the State in the first instance from seeking and obtaining a trial free of constitutional defects. See Note, *Unconstitutional Conditions*, 73 Harv. L. Rev. 1595 (1960).

The matter of increased sentences upon retrial has been considered recently by several of the Federal District Courts and Circuit Courts of Appeal. In *Patton v. North Carolina*, 256 F.Supp. 225 (W.D.N.C. 1966), the District Court held that it would not be constitutionally permissible to impose a harsher sentence upon retrial unless some justification was shown for it. The Fourth Circuit, reviewing the case, did not agree that an increased sentence could be justified at all "even where additional testimony had been introduced at the second trial." *Patton v. North Carolina*, 381 F.2d 636 (4 Cir. 1967). The First Circuit has held that a defendant's sentence could not be increased upon retrial, even where the trial judge stated the reason for the harsher sentence, unless the reason for the increase was based solely upon events subsequent to the first conviction. *Marano v. United States*, 374 F.2d 583 (1 Cir. 1967).

In the case at bar the District Court below, while citing *Marano*, adopted the rule expressed by the trial court in *Patton*:

"This court, after considerable study, has concluded that a sentence imposed by a court on retrial after post-conviction attack that is harsher than the sentence originally imposed—unless some justification appears therefor—violates the Due Process Clause of the Constitution of the United States (A. 64).

"This court does not believe that it is constitutionally impermissible to impose a harsher sentence upon retrial if there is recorded in the court record some legal justification for it" (A. 68).

The court then held that the burden was on the State to justify any increase in the original sentences presumably by reference to some court record (A. 68). *Gainey v. Turner*, 266 F.Supp. 95 (E.D.N.C. 1966); *Patton v. North Carolina*, 256 F.Supp. 225 (W.D.N.C. 1966). With reference to the uncontroverted facts (A. 61), the District Court found:

"Here, the State of Alabama offers no evidence attempting to justify the increase in Rice's original sentence. . . . It is shocking that the State of Alabama has not attempted to explain or justify the increase in Rice's punishment—in these three cases, over threefold" (A. 69).

Even if the compelling logic of the *Patton* and *Marano* decisions be ignored, Respondent again respectfully suggests that the evidence in this case—that Respondent's sentences were increased to punish him for having successfully exercised his post-conviction right of review—fully supports the opinion of the courts below which concluded that the increase in Respondent's sentences violated the Due Process Clause of the Constitution of the United States.

B. INCREASED SENTENCE IS A DENIAL OF EQUAL PROTECTION.

In Alabama there can be no increase in sentence after sentence is imposed. To deny this protection to that class of prisoners who elect to exercise post-conviction remedies is to unjustly discriminate against persons already denied a fair trial. The imposition of greater sentences on prisoners solely because they pursue post-conviction remedies bears no rational connection with any legitimate state interest and creates an arbitrary classification among prisoners which violates the Equal Protection Clause of the Fourteenth Amendment. *Patton v. North Carolina*, 381 F.2d 636 (4 Cir. 1967). It is as logical and just to forbid classifications which discriminate against prisoners wrongfully convicted as to forbid classifications which discriminate against the poor. *Griffin v. Illinois*, 351 U.S. 12 (1956). In neither instance is there any rationality as to the nature of the class singled out or relevancy to the purpose for which the classification is made. *Rinaldi v. Yeager*, 384 U.S. 305 (1966).

C. INCREASED SENTENCE PLACES A DEFENDANT IN DOUBLE JEOPARDY.

The courts below did not base their decisions upon double jeopardy grounds, although several courts have recently done so in spite of the half-century old case of *Stroud v. United States*, 251 U.S. 15 (1919).

The case of *Green v. United States*, 355 U.S. 184 (1957), reversed a first degree murder conviction on retrial where the original conviction had been of second degree murder, the Court holding that the first jury had "impliedly acquitted" the prisoner of first degree murder. Several California courts have adopted the theory of *Green* and applied

it in situations where, as in this case, longer sentences are involved but not different "degrees" of a crime. *People v. Ali*, 57 Cal. Rptr. 348, 424 P.2d 932 (1967); *In re Ferguson*, 233 Cal. App. 2d 79, 43 Cal. Rptr. 325 (1965); *People v. Henderson*, 60 Cal. 2d 482, 35 Cal. Rptr. 77, 386 P.2d 677 (1963). These courts take the position that the prisoner was "impliedly acquitted" of any longer sentence than he actually received at his first trial and upon retrial can receive no greater sentence than before, lest he be reprosecuted for an offense of which he has been acquitted.

The Fourth Circuit, however, took a different approach in *Patton* and pointed out that in *Stroud* the Court did not consider that aspect of double jeopardy which prohibits multiple punishment for the same offense and which therefore prohibits any increase in punishment following retrial. For a brief examination of this theory see the discussion of the District Court decision in *Patton* in 80 Harv. L. Rev. 891 (1967).

II.

Failure of the State of Alabama to Give Respondent Credit on New Valid Sentences for Time Served Upon Prior Invalid Sentences for the Same Offenses Was Unconstitutional in That It Violated the Due Process and Equal Protection Provisions of the Fourteenth Amendment, the Double Jeopardy Clause of the Fifth Amendment, the Thirteenth Amendment's Prohibition Against Involuntary Servitude and the Eighth Amendment's Prohibition Against Cruel and Unusual Punishment, and Denied Respondent the Right to a Speedy Trial Secured to Him by the Seventh Amendment.

A. DENIAL OF CREDIT IS A DENIAL OF DUE PROCESS.

At the time Respondent's original convictions were vacated as the result of coram nobis proceedings in the State Courts, he had been in prison for over two and one-half years (A. 62). When resentenced after his second trials, Respondent was not given credit on his new sentences for the time previously served (A. 62). The District Court, citing *Hill v. Holman*, 255 F.Supp. 924 (M.D. Ala. 1966), and *Patton v. North Carolina*, 381 F.2d 636 (4 Cir. 1967), held as follows:

"This rule of due process is applicable in this case and will not allow the State of Alabama to permit petitioner to be penalized by service in the state penitentiary because of an error the Circuit Court of Pike County made . . . He was . . . constitutionally entitled, upon being resentenced . . . to be given credit for each of the days he had served upon the voided sentence . . ."

Not only is the Due Process Clause violated because it is so grossly unfair and shocking to deny a defendant credit for prior time served on the same offense by simply refusing to recognize the years served under a void sentence, it is also violated in that a defendant's legal right of post-conviction review is thereby conditioned upon his relinquishment of prior time served in the event he is successful. *Gray v. Hocker*, 268 F.Supp. 1004 (D. Nev. 1967). Respondent submits that this amounts to an "unconstitutional condition", which denies persons wrongfully convicted the right to pursue unfettered the post-conviction remedies made available by the State.

B. DENIAL OF CREDIT IS A DENIAL OF EQUAL PROTECTION.

The State of Alabama would deny credit for time served in prison to that class of prisoners who successfully seek post-conviction review if they are subsequently resentenced on the same charges. This creates an invidious classification which violates the principle of Equal Protection by unfairly discriminating against persons already denied a fair trial who must bide their time in prison awaiting post-conviction relief. It is arbitrary and unreasonable to deny these prisoners credit for this time spent in jail where full credit is given to those prisoners who elect not to seek post-conviction relief. Of course, those defendants who are able to make bond pending the outcome of such review are not required to suffer imprisonment at all. This kind of unnecessary discrimination between defendants has been repeatedly condemned by this Court. *Lane v. Brown*, 372 U.S. 477 (1963); *Draper v. Washington*, 372 U.S. 487 (1963); *Douglas v. California*, 372 U.S. 353 (1963); *Griffin v. Illinois*, 351 U.S. 12. (1956).

Petitioner points out that the State of Alabama now follows the decision in *Hill v. Holman*, 255 F.Supp. 924 (M.D. Ala. 1966), and allows a prisoner credit for time served on a void sentence when there is another valid sentence pending against him during the period such time was served, but says that *Hill* should not control the case at bar.

Petitioner attempts to distinguish the factual situation in *Hill v. Holman*, *supra*, from the circumstances surrounding Respondent's imprisonment. Respondent submits that the distinction is not only forced, but is clearly arbitrary and unreasonable. The State reasons that when one of Hill's several sentences was vacated, the time he had served on that sentence was applied to the valid sentences because they "existed during the period such time was served." However, the State says in this case, because *all* and not *some* of Respondent's sentences were vacated, then he is not entitled to receive credit for the time served when resented for the same offenses, because once the original sentences were vacated no valid judgment was then pending against him to which the time served could attach. Respondent submits that this reasoning is without rhyme or reason—unless it be administrative red tape. It ignores the simple but important fact that Respondent was resented for the identical offenses for which he was originally sentenced, and suggests that Respondent is urging that a prisoner be allowed to serve a sentence prior to his conviction. Respondent is not attempting to have past prison time apply to a sentence for a crime not committed at the time of his original prosecutions, and the lower Courts did not hold that this would be proper. Respondent was tried and sentenced for committing certain offenses; he served at least a portion of the punishment imposed because of these of-

fenses; and he was retried by the *same* Court and resented by the *same* judge for committing the *same* offenses. While the case of *Newman v. Rodriguez*, 375 F.2d 712 (10 Cir. 1967) does hold that time served need not be credited against a new sentence, it does not discuss the artificial factual distinction attempted by Petitioner in its brief. Should Petitioner's reasoning be followed, a prisoner sentenced on a single offense and later retried and resented for the same offense could be compelled to serve more time under the two sentences than the maximum punishment provided by law. A single offense was involved in *Patton*, as in the cases of *Holland v. Boles*, 269 F.Supp. 221 (N.D.W.Va. 1967) and *Gray v. Hacker*, 268 F.Supp. 1004 (D. Nev. 1967), which hold that credit must be given.

In the case at bar, Respondent had served over two and one-half years in Case No. 6427 when it and his three other sentences were set aside. When resented to ten years in that same case, he was given no credit for his prior time. Thus, except for the decisions of the lower Court herein, he could have been required to serve more than the maximum of ten years fixed by law for the crime for which he was convicted. It is noteworthy that the unreported opinion of the Supreme Court of Alabama, in *Ex parte State of Alabama, ex rel. Attorney General*, 6th Div. 543, a copy of which is printed in Appendix B of Petitioner's brief, holds:

"When a defendant is resented, the total sentence in point of time, when added to the time already served including credit for good behavior, should not exceed the maximum . . ."

The lower courts also held that Respondent would be entitled to credit for "good time" earned during his several

periods of incarceration (A. 63 & 71). *Short v. United States*, 344 F.2d 550 (D.C. Cir. 1965); *Hill v. Holman*, 255 F.Supp. 924 (M.D. Ala. 1966); see also *Hoffman v. United States*, 244 F.2d 378 (9 Cir. 1957); and *Youst v. United States*, 151 F.2d 666 (5 Cir. 1945). Although the District Court below found that Respondent did not earn any "good time" while serving his first sentences, it went on to compute the "good time" earned since resentencing (A. 72). Petitioner does not now seem to object to these computations and we accordingly assume that the State now concedes that such portion of the opinion of the lower Court was correct.

C. DENIAL OF CREDIT PLACES A DEFENDANT IN DOUBLE JEOPARDY.

As pointed out in the preceding argument, the State of Alabama attempted to require Respondent to serve more than the maximum sentence of ten years fixed by law for one of the crimes for which he was convicted. This serves to illustrate Respondent's contention that failure to credit him for prior time served in the same case constitutes multiple punishment for the same offense in violation of the Double Jeopardy Clause of the Fifth Amendment. *Patton v. North Carolina*, 381 F.2d 636 (10 Cir. 1967). While it is true that Respondent agreed to and even sought a second trial, he certainly did not seek or agree to multiple punishment for one offense. See *Ex parte Lange*, 85 U.S. 163, 168 (1873), where the Court said:

"If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense. And . . . there has never been any doubt of . . . [this rule's] entire

and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offense."

Admittedly, this court has not expressly ruled that the Double Jeopardy Clause is applicable to the State. However, this issue is now before the Court in *Benton v. Maryland* (No. 201 October Term, 1968), and may be decided in that case.

D. DENIAL OF CREDIT SUBJECTS A DEFENDANT TO INVOLUNTARY SERVITUDE.

By denying Respondent credit, upon resentencing, for prior time served in the same case, under the theory that once the original convictions are set aside the State may refuse to recognize the incidents of that conviction and may ignore the time actually served, the State's original incarceration of the Respondent amounted to involuntary servitude, for the time which Respondent served was not as punishment for a crime of which he had been duly convicted.

In the case of *United States v. Morgan*, 222 F.2d 673, 674 (2 Cir. 1955) the court said:

"[A] defendant's assistance by counsel in a criminal trial is an absolute right . . . A conviction in a case where the defendant has not enjoyed that fundamental right is void. His imprisonment also violates the Thirteenth Amendment which forbids involuntary servitude, except as 'punishment for crime', since no punishment for crime can be valid unless after a valid trial or a valid plea of guilty."

See also *U. S. ex rel. Caminito v. Murphy*, 222 F.2d 698 (2 Cir. 1955), cert. den. 350 U.S. 896 (1955).

If a defendant is released after the judgment is set aside there is no way the years spent in jail can be returned to him. But if he is re-convicted for the same offense, those years *can* be returned—by the simple device of reducing the second sentence by time served under the first. This much the Thirteenth Amendment requires.

E. DENIAL OF CREDIT IS CRUEL AND UNUSUAL PUNISHMENT.

The Eighth Amendment's ban on cruel and unusual punishment is made obligatory on the States through the Fourteenth Amendment. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

The denial, upon resentencing, for prior time actually served by a defendant in the same case, is so completely arbitrary and shocking to the sense of justice as to constitute cruel and unusual punishment particularly where, as in the case at bar, the Respondent's collective punishment in case No. 6427 exceeded the maximum punishment provided by law.

F. DENIAL OF CREDIT IS A DENIAL OF DEFENDANT'S RIGHT TO A SPEEDY TRIAL.

In *Klopfer v. North Carolina*, 386 U.S. 213 (1967), this Court held that the Sixth Amendment's guaranty of an accused's right to a speedy trial was rendered applicable to the states through the Due Process Clause of the Fourteenth Amendment.

Petitioner, by refusing to credit Respondent, upon resentencing, with prior time served on the same offense, implies that because the earlier sentences were vacated it may

ignore Respondent's prior prison service as though he had never served it. Respondent respectfully suggests that he may as logically take the position that, because of a more than two year delay between the time of his arrest and the time he was appointed counsel and brought to trial, he was denied his right to a speedy trial, one of the most basic rights preserved by the Constitution.

Conclusion

In its brief Petitioner does not attempt to justify the State's policy of denying credit to prisoners for prior time served in the same case. With respect to increased sentences upon retrial, its only explanation is that a *guilty* person who pleads guilty should receive a lesser sentence than one who insists on a trial. We do not agree that this is a "heathy situation", for the same choice is offered those accused persons who may be innocent. Indeed, it can be argued that the reward of a lesser sentence for a plea of guilty compels an accused to be a witness against himself in violation of the Fifth Amendment and imposes upon his right to a fair trial an unconstitutional condition that he forfeit the benefit of a lesser sentence offered by the State.

The District Court below heard the evidence and was startled and shocked by the treatment afforded Respondent by the State of Alabama (A. 69, 88). Its conclusion, adopted by the Circuit Court below, that Respondent was denied due process and the equal protection of the law is logical and just.

For the reasons set out in this brief, it is respectfully submitted that the decision below should be affirmed.

Respectfully submitted,

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Attorney for Respondent

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Of Counsel

The undersigned hereby acknowledge service of a copy of the foregoing Brief of Respondent.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1968

Nos. 413 and 418

NORTH CAROLINA,

Petitioner,

—v.—

CLIFTON PEARCE,

Respondent.

CURTIS SIMPSON,

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—v.—

WILLIAM RICE,

Respondent.

MOTION OF THE AMERICAN CIVIL LIBERTIES
UNION AND THE AMERICAN CIVIL LIBERTIES
UNION OF NORTH CAROLINA FOR LEAVE TO
FILE A BRIEF AS *AMICI CURIAE* AND BRIEF
AMICI CURIAE

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tions*, 117 U. Pa. L. Rev. 144 21Samuels, *Criminal Appeal Act*, 1964, 27 MODERN L.
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Motion for Leave to File a Brief as *Amici Curiae**

The American Civil Liberties Union and the American Civil Liberties Union of North Carolina respectfully move for leave to file a brief as *amici curiae* in these cases.

The interest of the American Civil Liberties Union is twofold: the general interest it holds as a civil liberties organization, and, more specifically, a belief that justice and due process require that the decisions in these cases be affirmed.

Since its founding in 1920, the American Civil Liberties Union has sought to prevent and to redress violations of civil liberties protected by the Constitution through litiga-

* Consent has been granted by Respondent in No. 413 and Petitioner in No. 418. Petitioner in No. 413 and Respondent in No. 418 did not reply to Amici's request.

tion, educational programs, public statements and petitions to the Government. Its intention has never been to further the interest of any special group, but rather to defend the civil liberties of all persons equally. The American Civil Liberties Union hopes that an argument presented by an organization both experienced and specially concerned with maintaining constitutionally guaranteed liberties may be of aid to the Court in its adjudication of the sensitive issues raised by these cases.

Amici move for leave to file this brief for two specific reasons:

- a. The harm resulting to respondents and to other successful criminal appellants from the harsher sentencing practices condemned by the courts below warrants the fullest possible exposition of the serious constitutional issues involved.
- b. The currency of harsher sentencing practices not yet specifically condemned by any particular decision from this Court produces a critical constraint on basic civil liberties requiring uniform protection in the decision of this Court in light of comprehensive consideration of the constitutional issues raised.

We believe our brief will aid the Court by emphasizing these aspects of the litigation and especially by bringing to bear certain developments so recent and unreported as not necessarily to have been found by the parties. If our arguments were accepted, they would be dispositive of both cases.

Respectfully submitted,

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Attorney for Movants

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**BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION
AND THE NORTH CAROLINA CIVIL LIBERTIES
UNION, *AMICI CURIAE***

Interest of the *Amici*

We respectfully refer the Court to the preceding motion for leave to file this brief wherein the interest of *amici curiae* is set forth.

Question Presented

Does Subjecting A Successful Crimintal Appellant to the Risk of Harsher Punishment and the Risk of Loss of Time Already Served, As a Condition of Securing Him the Opportunity for a Fundamentally Fair Trial, Violate the Due Process Clause of the Fourteenth Amendment?

Statement of the Cases

I. *Simpson v. Rice.*

In February, 1962, William Rice, an indigent, without benefit of counsel, was convicted of four counts of second degree burglary in Pike County Circuit Court, Alabama. On the first count, he was sentenced to four years. On each of the other three, he was sentenced to two years. The sentences were imposed to run consecutively. Thus, had Rice served these sentences pursuant to a state criminal proceeding in which the state had enjoyed a full opportunity to secure an adequate determination of his punishment but in which he had been denied due process of law, he would have served no more than ten years in prison.

After serving more than two-and-one-half years, however, Mr. Rice successfully sought a new trial pursuant to this Court's decisions in *Gideon v. Wainwright*, 372 U. S. 335 (1963); *Doughty v. Maxwell*, 376 U. S. 202 (1964); and *Pickelsimer v. Wainwright*, 375 U. S. 2 (1963). At the second trial, the state abandoned one of the four counts and succeeded again in convicting Mr. Rice only of the other three counts. The trial was held before the same judge who originally heard the case. Although nothing developed in the course of the second trial which the state

subsequently could point to by way of explanation, the trial judge denied Mr. Rice all credit for his two-and-one-half years of penitentiary service and then proceeded to impose consecutive sentences of ten, ten, and five years for the three counts of second degree burglary! Thus, the net effect of Rice's successful effort to secure a new trial consistent with due process was to lose all benefit of his prior service and to be recommitted to prison for twenty-five years where, by having done nothing, he could not have been made to serve more than seven-and-one-half years. His punishment, though on fewer counts and a record yielding no new information respecting matters previously unknown to the same judge who originally sentenced him, had been more than trebled.

On Rice's application for a writ of habeas corpus to the federal district court for the Middle District of Alabama, Judge Frank Johnson held that the denial of credit constituted a denial of due process and that the imposition of harsher sentences without "reasons . . . affirmatively appearing in the) record," violated the due process and equal protection clauses of the fourteenth amendment. *Rice v. Simpson*, 274 F. Supp. 116, 121 (M. D. Ala. 1967). On appeal, the Court of Appeals for the Fifth Circuit affirmed 396 F. 2d 499 (1968), after which this Court granted the State's Petition for Certiorari.

II. *North Carolina v. Pearce.*

In May, 1961, Clifton Pearce, an indigent, was convicted of assault with intent to commit rape, in the Superior Court of Durham County, North Carolina, and sentenced from twelve to fifteen years. After serving nearly six-and-one-half flat and gain time of that sentence, Pearce secured a

new trial on the basis that the admission into evidence of inculpatory statements secured by a police officer during a four month period while Pearce was in custody but without counsel operated to deprive him of his liberty without due process under the state and federal constitutions. *State v. Pearce*, 266 N. C. 234, 145 S. E. 2d 918 (1966). On retrial for the same offense, Pearce was again convicted. Although "the evidence on the new trial was not essentially different" from "the evidence adduced at the trial in 1961," (*State v. Pearce*, 151 S. E. 2d 571 (N. C. 1966)) Pearce was sentenced more severely to eight years with service commencing on February 6, 1967. The harsher net effect was twofold. First, by having raised the constitutional issue rather than remaining passively in prison under a conviction which violated his constitutional rights, Pearce was made to forfeit his parole eligibility. At the time he applied for a new trial, he was already eligible for parole; under the subsequently imposed harsher sentence, he would not become eligible for parole for an additional two years. (In North Carolina, a prisoner is eligible for parole consideration after serving one-fourth of his sentence. N. C. G. S. §148-58.) Second, the date for his outright release was extended by a minimum two years and eleven months. See Petitioner's Brief, notes 1 and 2.

On November 20, 1967, the federal district court for the eastern district of North Carolina entered an Order in response to Pearce's petition for a writ of habeas corpus holding that the harsher sentence violated the due process and equal protection clauses of the fourteenth amendment, and providing the State with ample opportunity to secure a new sentence consonant with the original sentence. No appeal was taken by the state from this order. Upon

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refusal of the state superior court to resentence Pearce, the district court ordered his release. Its decision was affirmed per curiam by the Court of Appeals for the Fourth Circuit, 397 F. 2d 253 (1968), after which this Court granted the state's petition for certiorari.

Both cases are characterized by the following factual elements:

1. In both cases, the State enjoyed an error-free opportunity at the conclusion of the first trial to secure an adequate sentence.
2. In neither case is there evidence in the record or explanation by the State to account for the harsher sentences following retrial. Neither case yields even the slightest basis for overcoming whatever presumption of regularity might attach to the sentencing imposed at the conclusion of the first trial.
3. In both cases, the sole error committed in the course of the first trial was prejudicial to the accused and did not at all affect the opportunity of the state to secure a fair and adequate sentence.
4. In both cases, the magnitude of error against the accused was of constitutional proportions which operated to deprive him of his liberty without due process.
5. In both states, post-conviction conduct of convicted defendants is properly subject to consideration by the Board of Paroles in the appropriate exercise of its discretion.
6. In both states, the risk that a defendant's total active sentence may be extended even beyond the term im-

posed at the conclusion of his first trial is imposed solely upon successful appellants.

7. In neither state is the forfeiture of sentence for successful appellants alone expressly approved by the legislature. Nor are there legislative studies or any other studies or evidence of any kind whatever which would suggest that the public safety would be less secure if successful appellants were given the same protection against harsher sentences as all other defendants.

A R G U M E N T

To Subject an Accused to the Risk of Harsher Punishment or Loss of Time Already Served Solely as a Condition of Appeal Essential to Secure His Constitutional Right to a Fair Trial, Is an Unconstitutional Condition Which Violates the Due Process Clauses of the Fifth and Fourteenth Amendments.

We respectfully submit that the crux of the constitutional issues in these harsher resentencing cases was correctly recognized two years ago by Judge Sobeloff, in *Patton v. North Carolina*, 381 F. 2d 636, 640 (4th Cir. 1967), *cert. denied*, 390 U. S. 905 (1968). In essence, all of the arguments and all of the several converging constitutional considerations boil down to this:

[A State imposing the risk of harsher punishment on a successful criminal appellant] deprives the accused of the constitutional right to a fair trial, then dares him to assert his right by threatening him with the risk of a longer sentence. It may not exact this price. En-

joyment of a benefit or protection provided by law cannot be conditioned upon the "waiver" of a constitutional right.

Judge Sobeloff's full opinion seems to us sufficiently important to a correct determination of the issues now before this Court that we have felt it appropriate to append a copy to this brief in lieu of more elaborately developing arguments and authorities than necessary under the circumstances. Indeed, we extend this brief as far as we do only by way of clarification of points the misapprehension of which may have contributed to the recent opinion of Judge Friendly in *United States v. Coke*, No. 529, decided November 27, 1968 (unreported), a case in which the Court of Appeals for the Second Circuit rejected arguments respecting the unconstitutionality of harsher sentencing even while almost entirely forbidding the practice itself pursuant to its supervisory authority. Between those two cases and the clarifications corrective of *Coke* submitted in this brief, we believe the unconstitutionality of imposing the risk of harsher sentences upon successful criminal appellants will readily be determined by this Court. ✓

In the two pending cases, *Pearce* and *Rice*, as in every other case where the problem currently before this Court is posed, the prosecution has enjoyed a full and fair opportunity to bring to the attention of the judge or jury all matters appropriately bearing on the punishment of the accused. To the extent that developments subsequent to trial and conviction may also bear upon the time when the accused should be released from custody, the government here, as in every other case, is free to have such matters considered by the parole board (or, as in some states,

by an adult sentencing authority). In the unlikely event that some prior offense escaped the notice of the court when the accused was under consideration for sentencing, moreover, the government is free to bring a separate proceeding under its habitual offender (recidivism) acts. To the little extent that states may be concerned that sentences generally tend to be imposed in some instances without due consideration of the nature of the offense or the character of the accused, moreover, each state is constitutionally free to make ample provision for staffing and presentence reports to guard against unduly lenient sentencing to whatever extent that government feels to be appropriate. Indeed, each state presumably has done this to the precise extent that it has been genuinely concerned with the securing of sentences which are both fair to the accused and adequate for the public safety.

We emphasize these matters at the outset for two reasons. First, to settle the fact that there are ample avenues open to government to secure the fair punishment of all who are guilty of breaking its laws, without recourse to capricious devices applicable solely to those whom government deprived of their freedom in an error-ridden trial. Second, to settle the fact that recognition of the due process right of an accused not to be subjected to the risk of harsher punishment as a condition of securing a fundamentally fair trial would in no respect whatever give him a "sentence advantage" over others convicted of crime.

Since these things are true, it becomes quite impossible to understand any basis on which a state can assert a compelling interest in threatening to obliterate the credit one has acquired while serving his sentence and threatening even to impose a harsher sentence should that person rely

upon the decisions of this Court by insisting upon his right to a fundamentally fair trial.

In neither of the cases at hand did the accused seek to be free of a second trial; rather, he seeks to be free only from hazards not imposed on those content to wait out their time in prison whether or not they were fairly convicted, too fearful of a harsher sentence following a second trial even to murmur a complaint. Since the accused does not seek to avoid a fair trial, moreover, early decisions by this Court in which the issue was solely whether a successful criminal appellant could be retried following appeal are obviously not applicable. See, e.g., *Stroud v. United States*, 251 U. S. 15 rehearing denied, 251 U. S. 380 (1920); *Robinson v. United States*, 144 F. 2d 392 (6th Cir. 1944), *aff'd*, 324 U. S. 282 (1945); *Murphy v. Massachusetts*, 177 U. S. 155 (1900). As Judge Sobeloff observed of *Stroud*:

Stroud thus stands for no more than the well-established proposition that the double jeopardy clause does not entitle a defendant who successfully attacks his conviction to absolute immunity from reprosecution. *Patton v. North Carolina*, 381 F. 2d at 644-45.

While it is impossible to locate a rationale for a state's failure to give repose to sentences only of those originally denied a fair trial, it is virtually self-evident how the risk of harsher sentencing must necessarily affect the opportunity of an accused to secure a fair trial. The point is well observed in the A. B. A. Project on Minimum Standards for Criminal Justice, Standards Relating to Post-Conviction Remedies 95-96 (Ten. Dr. 1967), recently approved by the A. B. A. House of Delegates, to forbid harsher sentencing on retrial under any circumstances:

Care should be taken to prevent the imposition of more harsh sentences, or the implicit threat of the possibility, from deterring applicants with meritorious claims from presenting them for vindication. There is some evidence that this repressive attitude exists today. "The only hope for straightening things out is to give some 'Gideonite' a new trial and reconvict him," said a clerk of court in Escambia County, Florida. "If we give him a heavier sentence than he got the first time, maybe that will serve as a lesson to the others." *Time Magazine*, Oct. 18, 1963, p. 53. A trial judge in Delaware County, Pennsylvania, denying a defendant credit for over three years of time already served under an invalidated sentence, said: "This is the risk these prisoners take when they seek to take advantage of new legal interpretations." *Delaware County (Pa.) Daily Times*, March 24, 1965, §2, p. 1.

A North Carolina defendant, originally convicted without counsel and sentenced to two years in prison, successfully challenged that judgment; following conviction again, he was sentenced to ten years and denied credit for time previously served. See *State v. Williams*, 261 N. C. 172, 134 S. E. 2d 163.

Again, as Judge Sobeloff noted in *Patton*:

That this is a very real risk and not merely hypothetical is indicated by an informal survey conducted by the Duke Law Journal which revealed that in 72% of the retrials occasioned by the denial of counsel at the first trial, credit for time already served was effectively denied. Note, *Increased Sentence and Denial of Credit on Retrial Sustained Under Traditional*

Waiver Theory, 1965 Duke L. J. 395, 399 n. 25. 381 F. 2d at 639.

And the *in terrorem* effects of this risk have been attested most poignantly by one who was acquitted on retrial but who indicated that he would not even have sought a new trial had he then known of the risk. Thus, a prisoner having successfully applied for a Writ of Habeas Corpus to Judge Craven (who initially decided the *Patton* case) wrote the Judge shortly thereafter:

Dear Sir:

I am in the Mecklenburg County jail. Mr. _____ chose to re-try me as I knew he would.

...

Sir the other defendant in this case was set free after serving 15 months of his sentence, I have served 34 months and now I am to be tried again and with all probability I will receive a heavier sentence then before as you know sir my sentence at the first trial was 20 to 30 years. I know it is usually the courts procedure to give a larger sentence when a new trial is granted. I guess this is to discourage Petitioners. Your Honor, I know you have tried to help me and God knows I appreciate this but please sir don't let the state re-try me if there is any way you can prevent it. *Patton v. North Carolina*, 256 F. Supp. 225 (W. D. N. C. 1966).

Thus, the A. B. A. Draft Standards provide:

§6.3 Sentence on re-prosecution of successful applicants: credit for time served.

(a) Where prosecution is initiated or resumed against an applicant who has successfully sought post-

conviction relief and a conviction is obtained, or where a sentence has been set aside as the result of a successful application for post-conviction relief and the defendant is to be resentenced, the sentencing court should not be empowered to impose a more severe penalty than that originally imposed.

(b) Credit should be given towards service of the minimum and maximum term of any new prison sentence for time served under a sentence which has been successfully challenged in a post-conviction proceeding.

This recommendation, incidentally, merely brings our own standards into line with England where "upon reconviction the accused may not be given a sentence of greater severity than that imposed at the original trial, and the new sentence is dated back to the commencement of the former sentence, excluding any time spent on bail meanwhile." Samuels, *Criminal Appeal Act*, 1964, 27 MODERN L. REV. 568, 572 (1964). Similarly, it would merely bring our civilian standards into line with treatment of our own military where harsher resentencing and the denial of credit are also forbidden. Uniform Code of Military Justice, Art. 63(b), 60 Stat. 127, 50 U. S. C. A. §650(b) (1951). For that matter, it would bring us abreast of the Germans who also forbid harsher resentencing. German Code of Criminal Procedure §331 (para. 1) and §358 (para. 2).

Recognition of the intrinsic unfairness of harsher resentencing and its unessentiality to orderly government has mounted rapidly among a growing number of federal and state courts with occasion to consider the problem during the past three years. Thus, as already noted, the Court of

Appeals for the Fourth Circuit has prohibited harsher sentencing upon retrial of a successful criminal appellant for the same offense, on constitutional grounds. *Patton v. State of North Carolina*, 381 F. 2d 636 (4th Cir. 1967), cert. denied, 390 U. S. 905 (1968). The Court of Appeals for the First Circuit has prohibited harsher sentencing in the exercise of its supervisory authority over the district courts, except where the record of the second trial discloses information in a presentence report not available to the first judge. *United States v. Marano*, 374 F. 2d 583 (1st Cir. 1967). The Court of Appeals for the Second Circuit, while not accepting the constitutional persuasion, nonetheless has outlawed harsher sentencing in the exercise of its supervisory authority except where the record of the second trial discloses evidence in aggravation of the offense and a specification of reasons by the judge. *United States v. Coke*, No. 529, Sept. Term, 1967, Decided Nov. 27, 1968 (not yet reported). The Fifth Circuit's position is partly reflected in *Rice v. Simpson*. In addition, Judge Thornberry of the Fifth Circuit recently observed:

In my judgment, *Patton v. North Carolina*, 4th Cir. 1967, 381 F. 2d 636, cert. denied, 1968, 88 S. Ct. 818, presents unanswerable constitutional objections to an increased sentence or denial of credit for time served on retrial where the original conviction has been set aside on collateral attack because of constitutional errors. *State of Texas, et al. v. Grundstrom*, No. 25423, at p. 13, decided Oct. 25, 1968 (not yet reported).

The Ninth Circuit appears similarly to have forbidden harsher sentencing in the lower federal courts, although the precise technical grounds are not clear. *Walsh v. United*

States, 374 F. 2d 421 (9th Cir. 1967). Similarly, the highest courts of California, Oregon, New Jersey, Michigan, Minnesota, Wisconsin, have either entirely (*e.g.*, California) or substantially (*e.g.*, Michigan) outlawed harsher sentencing, all within the past three years. See, *e.g.*, *People v. Henderson*, 60 Cal. 2d 482, 386 P. 2d 677 (1963); *People v. Ali*, 57 Cal. Rptr. 348 (1967); *State v. Turner*, 429 P. 2d 365 (Ore., 1967); *State v. Wolf*, 46 N. J. 301, 216 Atl. 2d 586 (1966); *Moore v. Buchko*, 154 N. W. 2d 437 (Mich. 1967); *State v. Leonard*, 159 N. W. 2d 577 (Wis. S. Ct., June 28, 1968). And for an apparently similar position in Arkansas, see *Rush v. State*, 395 S. W. 2d 3 (Ark. S. Ct. 1965).

It is true, of course, that not all of the courts have moved in this direction. Three federal circuit courts, in opinions antedating *Patton*, upheld harsher sentences in fairly broad terms. See *United States v. White*, 382 F. 2d 445 (7th Cir. 1967); *Newman v. Rodriguez*, 375 F. 2d 712 (10th Cir. 1967); *Starnes v. Russell*, 378 F. 2d 808 (3rd Cir.) *cert. denied*, 88 S. Ct. 166 (1967). It is respectfully submitted, however, that a fundamental rule does issue from the due process clauses of the fifth and fourteenth amendments altogether to bar all state and federal courts from conditioning the right of an accused to a fundamentally fair trial upon the risk of harsher sentencing, especially as the risk is borne only by a group identified by a characteristic having no relevance to any governmental objective in the reconsideration of a sentence, where the risk is inessential to any appropriate governmental purpose, and where it results in the unnecessary chilling of constitutional rights.

There are, specifically, three related constitutional rights which the risks of harsher sentencing unreasonably constrict and abridge. There is, first of all, the due process right to a

fundamentally fair trial which, in every case where the defendant has appealed successfully on the basis of a constitutional defect in his first trial, has—by definition—initially been denied. As the coerced price of asserting that right, the accused is threatened with a risk of harsher treatment that he could avoid only by giving up his right to fair trial.

Second, while “this Court has never held that the States are required to establish avenues of appellate review, . . . it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts.” *Rinaldi v. Yeager*, 384 U. S. 305, 310 (1966). Moreover, while the Court has declined to find a constitutional right to appeal as such (*McKane v. Durston*, 153 U. S. 684 (1894) (dicta)), it has implied that failure of a state to provide any adequate postconviction means of testing substantial federal questions may constitute a denial of due process. See *Young v. Ragen*, 337 U. S. 235, 236-39 (1949); *New York ex rel. Whitman v. Wilson*, 318 U. S. 688, 689, 692 (1943); *Mooney v. Holohan*, 294 U. S. 103, 110-13 (1935); *Moore v. Dempsey*, 261 U. S. 86, 90-91 (1923); *Smith v. Bennett*, 365 U. S. 708, 713 (1961). Surely no postconviction remedy is “adequate” if its availability is conditioned upon the compulsory forfeiture of time already served in prison and whatever protection would otherwise be provided by one’s original sentence. Assuming that a state need not provide for appeals, however, still it must observe fundamental fairness as a requirement of due process when it elects to do so:

One may not have a constitutional right to go to Bagdad, but the Government may not prohibit one from

going there unless by means consonant with due process of law. *Homer v. Richmond*, 292 F. 2d 719, 722 (D. C. Cir. 1961):

• See also *Slochower v. Board of Education*, 350 U. S. 551, 555 (1956):

To state that a person does not have a constitutional right to government employment is only to say that he must comply with reasonable, lawful, and nondiscriminatory terms laid down by the proper authorities.

Finally, we may note the necessary involvement of a companion constitutional right, namely the right secured in Article I, Section 9 of the Constitution that "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." The "Privilege of the Writ" was originally secured by the Judiciary Act of 1789, and carries into the federal courts today through 28 U. S. C. §2255. The availability of the writ in federal courts to test the legality of custody of state prisoners were established by Congress in 1866, and carries through today in 28 U. S. C. §2241(c). The availability of the writ is constricted and abridged, however, exactly to the extent that unreasonable conditions are placed upon it; without doubt, the practice of a state to subject one successfully applying for a writ of habeas corpus to the risk of harsher treatment following retrial effectively abridges its availability. Yet, this Court declared:

[T]he state and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus. *Ex parte Hull*, 312 U. S. 546, 549 (1941).

It is, moreover, entirely reasonable to conclude that state restriction of the writ, by subjecting petitioners to the risk of harsher sentencing, is incompatible with 28 U. S. C. §§2255 and 2241(c) themselves and must give way under the supremacy clause in Article VI of the Constitution.

The manifest unfairness of saddling successful appellants with the risk of harsher sentencing is clear from recent and prior utterances by this Court. In *United States v. Ewell*, Mr. Justice Fortas observed:

In a different setting this Court has vividly criticized the Government's attempt to penalize a successful appellant by retrying him on an aggravated basis. *Green v. United States*, 355 U. S. 184. Although the decision in *Green* was premised upon the Double Jeopardy Clause, its teaching has another dimension. *Green* also demonstrates this Court's concern to protect the right of appeal in criminal cases. It teaches that the Government, in its role as prosecutor, may not attach to the exercise of the right of appeal the penalty that if the appellant succeeds, he may be retried on another and more serious charge. MR. JUSTICE BLACK: speaking for the Court in *Green*, said: "The law should not, and in our judgment does not, place the defendant in such an incredible dilemma." 383 U. S. 116, 127-28 (1966) (dissenting opinion).

Concurring in the same case, Mr. Justice Brennan noted that he would have joined the dissent but that the facts indicated the defendants in *Ewell* could not be adjudged more harshly following their successful appeals. *Id.* at 125-26.

These opinions, we respectfully submit, correctly catch the spirit of the decisions by this Court in *Green v. United*

States, 355 U. S. 184 (1957), and *Fay v. Noia*, 372 U. S. 391 (1963). *Green* emphasized exclusively the agony of the accused in facing the risk of harsher treatment (there, the risk of reprosecution for a higher offense) as an unwarranted discouragement to secure a hearing on the constitutionality of his original conviction. While the Court distinguished the harsher sentencing case at the time in a footnote, 355 U. S. at 195 n. 14, Mr. Justice Frankfurter was surely correct in observing:

As a practical matter, and on any basis of human values, it is scarcely possible to distinguish a case in which the defendant is convicted of a greater offense from one in which he was previously convicted but carries a significantly different punishment, namely death rather than imprisonment. *Id.* at 213 (dissenting opinion).

Precisely on this basis, Judge Sobeloff concluded as he did in *Patton*, that the imposed risk of harsher sentencing denied the accused due process of law. 381 F. 2d 636, 638-641 (4th Cir. 1967), *cert. denied*, 390 U. S. 905 (1968). See also *Hetenyi v. Wilkins*, 348 F. 2d 844, 859 (2d Cir. 1965), *cert. denied*, 383 U. S. 913 (1966); *People v. Henderson*, 60 Cal. 2d 482, 35 Cal. Rptr. 77, 386 P. 2d 677 (1963); Van Alstyne, *In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant*, 74 YALE L. J. 606, 628-636 (1965).

The due process voiding of unreasonable conditions on the right to a fair trial is not, of course, a recent phenomenon. It dates at least from Mr. Justice Sutherland's opinion for the Court in *Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U. S. 583, 594 (1926), and has been uniformly applied in a vast variety of cases. See cases and materials

cited in Comment, *Another Look at Unconstitutional Conditions*, 117 U. PA. L. REV. 144 *passim*, esp. earlier discussions at note 1. It has been most recently applied by this Court in *United States v. Jackson*, 390 U. S. 570 (1968).

We believe, respectfully, that the only meaningful question open to consideration by this Court relates solely to the breadth of the constitutional prohibition against harsher resentencing. Here, too, however, we believe that Judge Sobeloff formulated the rule in a manner most conducive to fundamental fairness, most susceptible of uniform application with a minimum of administrative difficulty, and least susceptible of subliminal manipulation, when he observed (381 F. 2d at 641):

An analogy may be drawn between the solution adopted by the Supreme Court in *Gideon v. Wainwright*, 372 U. S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963), in response to the problems raised by *Betts v. Brady*, 316 U. S. 455, 62 S. Ct. 1252, 86 L. Ed. 1595 (1942), and the issue here. The Court had earlier held in *Betts* that whether the conviction of an unrepresented defendant has a denial of due process depended upon whether "special circumstances" existed which would, in a particular case, "constitute a denial of fundamental fairness." 316 U. S. at 462, 62 S. Ct. at 1256. But in *Gideon*, there was forthright recognition that to require such a showing, in an area in which the chance of undetectable prejudice is so great, was too heavy a burden to place upon an accused. The controlling point was not that the absence of counsel necessarily prejudiced the defendant, but that it created the opportunity for unfairness. For this reason, the *Gideon* Court made the presumption of injury irrebutable.

Similarly, improper motivation is characteristically a force of low visibility. In order to prevent abuses, the fixed policy must necessarily be that the new sentence shall not exceed the old.

We may observe in this case that the need for a prophylactic prohibition of harsher sentencing upon retrial is even more acute, since the possibility of undetectable prejudice would otherwise operate to recreate the very chilling effect upon the accused's ability to seek a fair trial which the rule is meant to alleviate. Moreover, the Court's more sensible preventive formulation in *Gideon* has been followed in *Miranda v. Arizona*, 384 U. S. 436 (1966), and no reason for a different or more restricted constitutional formulation presents itself in this case.

CONCLUSION

For the reasons noted above and further adduced in the appended Opinion in *Patton v. North Carolina*, 381 F.2d 636 (4th Cir. 1967), *cert. denied*, 390 U. S. 905 (1968), we respectfully urge that the decisions below be affirmed.

Respectfully submitted,

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January 1969

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Similarly, improper motivation is characteristically a force of low visibility. In order to prevent abuses, the fixed policy must necessarily be that the new sentence shall not exceed the old.

We may observe in this case that the need for a prophylactic prohibition of harsher sentencing upon appeal is even more acute, since the possibility of undetectable prejudice would otherwise operate to recreate the very chilling effect upon the accused's ability to seek a fair trial which the rule is meant to alleviate. Moreover, the Court's more sensible preventive formulation in *Gideon* has been followed in *Miranda v. Arizona*, 384 U. S. 436 (1966), and no reason for a different or more restricted constitutional formulation presents itself in this case.

APPENDIX

CONCLUSION

For the reasons noted above and further adduced in the appended Opinion in *Patterson v. North Carolina*, 381 U. S. 216 (4th Cir. 1967), cert. denied, 390 U. S. 903 (1968), we respectfully urge that the decisions below be affirmed.

Respectfully submitted,

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January 1969

APPENDIX

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

(Argued February 6, 1967)

Decided June 14, 1967)

No. 11005

EDDIE W. PATTON,

Appellee,

—v.—

STATE OF NORTH CAROLINA,

Appellant.

Before:

SOBELOFF, J. SPENCER BELL* and WINTER,

Circuit Judges.

SOBELOFF, *Circuit Judge:*

The question raised by this appeal is whether a defendant may be sentenced to a longer term of imprisonment at his second trial than he received after his first conviction, vacated on constitutional grounds.

Unrepresented by counsel, the petitioner, Eddie W. Patton, was tried in October, 1960 and convicted of armed robbery after a plea of nolo contendere, entered at the close of the State's evidence. He was sentenced to prison for

* Judge Bell participated in the hearing and concurred in the disposition of the case but died before the opinion was prepared.

a term of twenty years. No appeal was taken, but in April 1964, Patton applied for a state post-conviction hearing, and on the basis of the Supreme Court's landmark decision in *Gideon v. Wainwright*, 372 U. S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963), was awarded a new trial.

Patton remained in custody, and on February 17, 1965, after tendering a plea of not guilty, he was again convicted by jury on the original indictment. This time he had the assistance of counsel, who called the court's attention to the fact that the defendant had been continuously imprisoned from June 10, 1960 and had already served nearly five years for the offense. Although the trial judge paid lip service to the idea of crediting Patton with that portion of the initial twenty-year sentence already served, he actually increased Patton's punishment by imposing, in effect, a twenty-five-year sentence and then deducting five years for the time served.¹ Thus, as a result of seeking and obtaining a new trial, the prisoner, who originally would have been eligible for parole in October 1965, now, it is agreed, will not become eligible until February 1970.

Regardless of whether the action of the sentencing judge is verbalized as a twenty-year sentence without credit for the five years already served, or as a twenty-five-year sentence with credit, the practical effect of the second judge's sentence is to compel the defendant to serve five years longer to become eligible for parole, than he would have

¹ "The Court: Before I announce punishment, I will take into consideration the fact that he has served four years, or nearly five years.

• • • • •
 "The Court: • • • I would give you five more years than what I am giving you, but I am allowing you credit for the time that you have served. Judgment of the Court is that the Defendant be imprisoned in the State's Prison for a term of twenty years
 • • •"

been required to serve had he not asserted his constitutional right to a fair trial.

Patton applied in August 1965 to the District Court for a writ of habeas corpus, contending that a harsher sentence following a second conviction for the same offense, after the initial conviction has been vacated on constitutional grounds, is a denial of due process of law; is inconsistent with the prohibition against double jeopardy; and is a denial of equal protection of the law. The District Court held Patton's sentence unconstitutional on the ground that the increased punishment violated the due process and equal protection clauses of the Fourteenth Amendment. *Patton v. North Carolina*, 256 F. Supp. 225 (W. D. N. C. 1966).

I. Exhaustion of State Remedies

[1] The State has misconceived the import of Patton's arguments. It interprets his contention to be that the second trial judge, in imposing a more severe sentence, was motivated by prejudice because of the defendant's successful attack on the initial conviction. The State's position on this appeal is that such an allegation has never been presented to the state courts, and it reasons that Patton having failed to exhaust available state remedies or to show that circumstances existed rendering the state process ineffective to protect his rights, the District Court lacked jurisdiction under 28 U. S. C. §2254. The District Judge carefully reviewed the relevant North Carolina cases, however, and concluded that the effect of the opinions of the state supreme court is to hold that a defendant is not entitled to credit for time served and may receive an increased sentence (unless the subsequent sentence plus the time already served under the invalid first sentence should ex-

ceed the statutory maximum).² We share the District Court's view that since further resort to the North Carolina courts would be futile, it is not required.³

II. Due Process

The simplistic rationale traditionally offered for denying credit and permitting a harsher sentence at a second trial is that the prisoner, by successfully attacking his initial conviction, has "voided" or "wiped out" all consequences of that conviction—including the sentence imposed by the first judge and any time served under that sentence.⁴

² State v. Weaver, 264 N. C. 681, 142 S. E. 2d 633 (1965); State v. Slade, 264 N. C. 70, 140 S. E. 2d 723 (1965); State v. Anderson, 262 N. C. 491, 137 S. E. 2d 823 (1964); State v. White, 262 N. C. 52, 136 S. E. 2d 205 (1964); State v. Williams, 261 N. C. 172, 134 S. E. 2d 163 (1964).

³ Our conclusion is strengthened by the recent decision in State v. Pearce, 268 N. C. 707, 151 S. E. 2d 571 (1966), decided since the District Court's action. In that case, the defendant's sentence was increased following his second conviction, even though "[t]he evidence on the new trial was not essentially different" from that adduced at the original trial. In his appeal to the state supreme court, the defendant relied on Judge Craven's opinion here under review, to support his argument that any increase in the punishment imposed after a second conviction was in effect a penalty for seeking review of an invalid conviction, and a violation of his constitutional rights. The Supreme Court of North Carolina, however, declined to follow that opinion, stating flatly that "[w]e adhere to our former decisions." *Id.* at 708, 151 S. E. 2d at 572.

⁴ Plainly, the trial court regarded Patton's successful attack on his original unconstitutional conviction as a waiver of the benefit of nearly five years' imprisonment.

"The Court: Are you referring about the prior sentence that was imposed on you?"

Defendant: Yes, Sir.

The Court: That was wiped off.

Defendant: Yes, I understand that.

The Court: Mr. Patton, as your motion, because you moved that it be—and alleged and the Court found that your consti-

In *State v. White*, 262 N. C. 52, 136 S. E. 2d 205 (1964), the North Carolina Supreme Court stated that a defendant

"is not entitled as a matter of law to credit against the second sentence for time served under the original sentence. The rationale of the decisions seems to be that the defendant in seeking and obtaining a new trial *must be deemed to have consented to a wiping out of all the consequences of the first trial.*"⁵

262 N. C. at 56, 136 S. E. 2d at 208 (Emphasis supplied.)

The principle of fair dealing which impels judges in passing sentence to take into account the time a defendant was

tutional rights had been violated upon your motion, and that was all done away with. We are now confronted with a new day."

⁵ It is noteworthy, however, that the North Carolina Supreme Court has, on occasion boggled at this Draconian doctrine. In *State v. Weaver*, 264 N. C. 681, 142 S. E. 2d 633 (1965), the court quoted with approval from an opinion by the Massachusetts Supreme Court, *Lewis v. Commonwealth*, 329 Mass. 445, 108 N. E. 2d 922, 35 A. L. R. 2d 1277 (1952), as follows:

"It is hardly realistic to say that nine months in the State prison amount to nothing—that since the petitioner 'should not have been imprisoned as he was, he was not imprisoned at all.' [Citation omitted.] Moreover, . . . the time served before the reversal of the sentence might in some other case be so long that glaring and intolerable injustice would result if the time served on a first sentence should not be taken into account in imposing a second sentence. It is not even technically correct to say that the first sentence must now be deemed to have been a nullity. It was not a nullity when it was imposed or *while it was being served.*"

Id. at 685, 142 S. E. 2d at 636. (Emphasis supplied by North Carolina Supreme Court.) The North Carolina court added that "[t]he hard fact of his [Weaver's] actual service of sentence . . . cannot be ignored." *Id.* at 686, 142 S. E. 2d at 637. *Weaver*, however, was a case in which the second sentence imposed on the defendant was the maximum allowable under the statute, so that added to the time already served under the invalid first sentence, the punishment exceeded the statutory maximum.

deprived of his liberty while awaiting trial, *Dunn v. United States*, 376 F. 2d 191 (4th Cir. Feb. 24, 1967), insists even more inexorably that he shall not be finessed out of credit for time he was forced to serve under an invalid sentence. The trial and conviction may be voided on appeal, but the time illegally exacted by the unconstitutional sentence is an irreversible fact. It is grossly unfair for society to take five years of a man's life and then say, we now acknowledge that this should not have happened, but we will set everything right by refusing to recognize that it did happen. This is an unworthy pretense. Courts should not be astute to fashion legal fictions to attain unjust ends.*

The risk of a denial of credit or the risk of a greater sentence, or both, on retrial may prevent defendants who have been unconstitutionally convicted from attempting to seek redress.⁷ For this reason, the District Court de-

* Judge Edgerton, in *King v. United States*, 98 F. 2d 291 (D. C. Cir. 1938) characterized as "in the vein of *The Mikado*" the government's arguments that because the initial sentence was void, an accused "has served no sentence but has merely spent time in the penitentiary," and, that since the defendant "should not have been imprisoned as he was, he was not imprisoned at all." He facetiously suggested as logical corollaries to such arguments that the accused should also be "liable in quasi-contract for the value of his board and lodging, and criminally liable for obtaining them by false pretenses." *Id.* at 293-94.

⁷ Judge Craven himself has received a letter which vividly illustrates a prisoner's fear of obtaining an increased sentence following a new trial:

"Dear Sir:

I am in the Mecklenburg County jail. Mr. chose to re-try me as I knew he would.

Sir the other defendant in this case was set free after serving 15 months of his sentence. I have served 34 months and now I am to be tried again and with all probility I will receive a heavier sentence then before as you know sir my

clared that predicating Patton's constitutional right to petition for a fair trial on the fiction that he has consented to a possibly harsher punishment, offends the due process clause of the Fourteenth Amendment.^{7a} It would confront the prisoner with the unhappy choice of either abandoning his constitutional right to a fair trial and serving out his prison term under the invalid sentence, or exercising that right under the hazard, in the event of a second conviction, of being treated as though the years of imprisonment already served had never occurred.⁸

sentence at the first trial was 20 to 30 years. I know it is usually the courts procedure to give a larger sentence when a new trial is granted I guess this is to discourage Petitioners.

Your Honor, I don't want a new trial I am afraid of more time . . .

Your Honor, I know you have tried to help me and God knows I appreciate this but please sir don't let the state re-try me if there is any way you can prevent it.

Very truly yours"

256 F. Supp. at 231 n. 7. (Italics omitted.)

^{7a} Cf. *State v. Wolf*, 46 N. J. 301, 306, 216 A. 2d 586, 590-591 (1966). There the defendant, convicted of first-degree murder with a jury recommendation of life imprisonment, succeeded in obtaining a reversal on the basis of certain errors (non-constitutional in nature) committed at the trial. In holding that the State was barred on retrial from again seeking the death penalty, the Supreme Court of New Jersey found it unnecessary to decide whether the double jeopardy clause of either the federal or the state constitution, or the due process clause of the Fourteenth Amendment was applicable. The unanimous decision was based instead on certain "procedural policies" which were "of the essence of the administration of criminal justice."

⁸ That this is a very real risk and not merely hypothetical is indicated by an informal survey conducted by the Duke Law Journal which revealed that in 72% of the retrials occasioned by the denial of counsel at the first trial, credit for time already served was effectively denied. Note, *Increased Sentence and Denial of Credit on Retrial Sustained Under Traditional Waiver Theory*, 1965 Duke, L. J. 395, 399 n. 25.

[2] This is like the "grisly choice" discountenanced in *Fay v. Noia*, 372 U. S. 391, 83 S. Ct. 822, 9 L. Ed. 2d 837 (1963). "The law should not, and in our judgment does not, place the defendant in such an incredible dilemma." *Green v. United States*, 355 U. S. 184, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957).⁹ North Carolina deprives the accused of the constitutional right to a fair trial, then dares him to assert his right by threatening him with the risk of a longer sentence. It may not exact this price. Enjoyment of a benefit or protection provided by law cannot be conditioned upon the "waiver" of a constitutional right.¹⁰

⁹ In *Green*, it was argued that the defendant had "waived" the benefit of his first trial, in which he escaped conviction for a higher offense, as a condition for appealing his conviction of the lesser one. See *United States ex rel. Hetenyi v. Wilkins*, 348 F. 2d 844, 859 (2d Cir. 1965), where an analogous argument was rejected with the observation that it "ignore[s] the elementary psychological realities" and presumes "a barter theory of fairness"; and *United States v. Walker*, 346 F. 2d 428 (4th Cir. 1965), declaring that a defendant's motion to vacate his defective sentence could not be considered a waiver.

"In reality, whatever his words to the Court, Walker obviously did not desire to chance a greater term. If in law his wish 'to vacate' embraced that unnatural decision, he should not be held to it."

346 F. 2d at 431.

The Supreme Court has on numerous occasions articulated its concern that access to post-conviction remedies be unfettered. See, e.g., *Fay v. Noia*, supra; *Douglas v. State of California*, 372 U. S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963); *Green v. United States*, supra; *Griffin v. People of State of Illinois*, 351 U. S. 12, 76 S. Ct. 585, 100 L. Ed. 891 (1956); *Cichos v. State of Indiana*, 385 U. S. 1020, 87 S. Ct. 699, 17 L. Ed. 2d 559 (Nov. 14, 1966) (Fortas, J., dissenting); *United States v. Ewell*, 383 U. S. 116, 126, 86 S. Ct. 773, 15 L. Ed. 2d 627 (1966) (Fortas, J., dissenting).

¹⁰ See, e.g., *Lamont v. Postmaster General*, 381 U. S. 301, 85 S. Ct. 1493, 14 L. Ed. 2d 398 (1965); *Griffin v. California*, 380 U. S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965); *Sherbert v. Verner*, 374 U. S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963); *Speiser v. Randall*, 357 U. S. 513, 78 S. Ct. 1332, 2 L. Ed. 2d 1460

Indeed, this circuit has already held it impermissible to force upon an accused the risk of more severe punishment as a condition for securing a constitutional right. In *United States v. Walker*, 346 F. 2d 428 (4th Cir. 1965), the defendant was initially sentenced in his absence. When he successfully attacked the sentence on this ground, he was re-sentenced to a longer term. Judge Bryan, speaking for the court criticized the trial judge's disregard of the original sentence:

"[T]he import of the [District] Court's ruling was to condition his Constitutional right to seek correction upon the risk of another sentence, then unforeseeable in nature and extent. Thus, though not so intending, the Court potentially penalized him for asserting the privilege. This the law forbids * * * . [Citing *Green v. United States*, 355 U. S. 184, 78 S. Ct. 221, 2 L. Ed. 2d 184 (1957).]

* * * * *

It [the second, harsher sentence] was, in sum, the product of a procedure which could prove either deterring or punitive of an insistence on Constitutional privileges."¹¹

346 F. 2d at 430-431.

(1958); *Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U. S. 583, 46 S. Ct. 605, 70 L. Ed. 1101 (1926). See also *Van Alstyne*, In *Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant*, 74 Yale L. J. 606 (1965); *Note, Unconstitutional Conditions*, 73 Harv. L. Rev. 1595 (1960).

¹¹ "Denying a benefit because of the exercise of a right in effect penalizes that exercise, making it tantamount to a crime. Punishing constitutionally protected activities seems clearly a violation of substantive due process."

Note, Unconstitutional Conditions, 73 Harv. L. Rev. 1595, 1599-1600 (1960).

The District Court held that Patton's punishment could not be increased unless evidence justifying a harsher sentence appeared in the record, and that the State must bear the burden of showing that such facts were introduced at the second trial, since "where the record disclose[d] no colorable reason for harsher punishment," the effect would be to inhibit the constitutional right to seek a new trial.¹² 256 F. Supp. at 236. We agree with the District Court that it is an impossible task for the prisoner to prove improper motivation of the trial judge. It is equally impossible, and most distasteful, for federal courts to pry into the sentencing judge's motivation to ascertain whether vindictiveness played a part.

We do not think, however, that a defendant's rights are adequately protected even if a second sentencing judge is restricted to increasing sentence only on the basis of new evidence. We are in accord with the First Circuit, which has recently held that a sentence may not be increased following a successful appeal, even where *additional* testimony has been introduced at the second trial.

"The danger that the government may succeed in obtaining more damaging evidence on a retrial is just as real as the danger, for example, that the judge on his own may wish to reconsider, unfavorably to the defendant, the factors which led to his original disposition. We think that there must be repose not merely as to the severity of the court's view, but as to the severity of the crime."^{12a}

¹² One commentator has noted that the strongest reason for denial of credit is the desire of courts to discourage appeals. Whalen, *Resentence without Credit for Time Served: Unequal Protection of the Laws*, 35 Minn. L. Rev. 239, 248 (1951).

^{12a} *Marano* held flatly that it would be improper for the court to increase the sentence on the basis of additional testimony which

Marano v. United States, 374 F. 2d 583, 585 (1st Cir. Mar. 23, 1967). Contra, Starnes v. Russell, 378 F. 2d 808 (3rd Cir. May 25, 1967).

An analogy may be drawn between the solution adopted by the Supreme Court in *Gideon v. Wainwright*, 372 U. S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963), in response to the problems raised by *Betts v. Brady*, 316 U. S. 455, 62 S. Ct. 1252, 86 L. Ed. 1595 (1942), and the issue here.¹³ The Court had earlier held in *Betts* that whether the conviction of an unrepresented defendant was a denial of due process depended upon whether "special circumstances" existed which would, in a particular case, "constitute a denial of fundamental fairness." 316 U. S. at 462, 62 S. Ct. at 1256. But in *Gideon*, there was forthright recognition that to require such a showing, in an area in which the chance of undetectable prejudice is so great, was too heavy a burden to cast upon an accused. The controlling point was not that the absence of counsel necessarily prejudiced the defendant, but that it created the *opportunity* for unfairness. For this reason, the *Gideon* Court made the presumption of injury irrebutable.

[3] Similarly, improper motivation is characteristically a force of low visibility. In order to prevent abuses, the fixed policy must necessarily be that the new sentence shall not exceed the old. Seldom will this policy result in inade-

came out at the new trial, but suggested by way of dictum that in some circumstances it might not be "inappropriate for the court to take subsequent events [as disclosed in a new pre-sentence report] into consideration, both good and bad." As to the dictum, we do not agree, for the reasons developed in the text of this opinion.

¹³ Cf. Note, The Defendant's Challenge to a Racial Criterion in Jury Selection: A Study in Standing, Due Process and Equal Protection, 74 Yale L. J. 919 (1965).

quate punishment. Against the rare possibility of inadequacy, greater weight must be given to the danger inherent in a system permitting stiffer sentences on retrial—that the added punishment was in reaction to the defendant's temerity in attacking the original conviction. Even the *appearance* of improper motivation is a disservice to the administration of justice.

III. *Equal Protection*

The equal protection clause of the Fourteenth Amendment likewise compels a rule barring a sentence in excess of the one invalidated, and this protection extends even to one seeking to avail himself of a state's post-conviction remedies because of non-constitutional errors in the original trial.¹⁴

North Carolina strictly forbids an increase in a defendant's sentence after the trial court's term has expired and service of sentence has commenced.¹⁵ Thus the threat of a heavier sentence falls solely on those who utilize the post-conviction procedures provided by the State. If the State wishes to institute a system permitting upward revision of sentences, it must proceed upon a rational basis in selecting the class of prisoners it will subject to this threat. It may not discriminate in this regard against those who have availed themselves of the right to a fair trial. This is an arbitrary classification offensive to the equal protec-

¹⁴ See *Whaley v. North Carolina*, 4 Cir., 379 F. 2d 221 (decided this day).

¹⁵ E.g., *State v. Lawrence*, 264 N. C. 220, 141 S. E. 2d 264 (1965); *State v. McLamb*, 203 N. C. 442, 166 S. E. 507 (1932); *State v. Warren*, 92 N. C. 825 (1885).

tion clause.¹⁶ As the court-appointed counsel for the defendant has put it:

"The risk of a harsher sentence is borne exclusively by those who pursue some post-conviction remedy. Yet there is no reason to suppose that the original sentences of this group are any more likely to warrant review as a class than the sentences of other convicts who are not subject to the same risk. The vulnerable

¹⁶ See *McLaughlin v. State of Florida*, 379 U. S. 184, 85 S. Ct. 283, 13 L. Ed. 2d 222 (1964), which declares that classification

"must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily, and without any such basis."

Id. at 190, 85 S. Ct. at 287 [quoting from *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 155, 17 S. Ct. 255, 41 L. Ed. 666 (1897)]. See also, e.g., *Morey v. Doud*, 354 U. S. 457, 77 S. Ct. 1344, 1 L. Ed. 2d 1485 (1957); *Skinner v. State of Oklahoma*, 316 U. S. 535, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942).

The issue has been phrased by one writer as follows:

"Is there any rational justification for punishing *this* defendant substantially more than others who committed the same offense, simply because *this defendant* was not given a fair trial or was not properly sentenced the first time?"

Whalen, *Resentence without Credit for Time Served: Unequal Protection of the Laws*, 35 Minn. L. Rev. 239, 245 (1951). (Italics in original.) His answer is that

"there is no sound rationale for this treatment of an unfortunate class of criminal defendants. The injustice and illegality of the treatment the defendant has received before his first sentence began is no justification for discriminating against him at a second proceeding. . . ."

"It scarcely needs argument to show that the circumstance that the defendant has received treatment in the first instance which was violative of the Constitution is not a valid reason for making the distinction. Nor is it a policy congruent with our constitution to permit courts to deny credit for time already served, and thus discourage the use of review procedures."

Id. at 251.

class appears to be quite equivalent to a class described by race, right-handedness, indigence, or some other factor equally irrelevant in any proper determination of those whose sentences might appropriately be reviewed."¹⁷

Not only is the classification not a rational means for effectuating any legitimate state policy, but it also frustrates the pursuit of post-conviction remedies provided by the State. Courts should be especially vigilant to protect access to these remedies, rather than strive to fashion a doctrine inhibiting the exercise of the right to review.¹⁸

¹⁷ Van Alstyne, *In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant*, 74 Yale L. J. 606, 683 (1965).

The instant case does not confront us with the question of whether the classification is reasonably related to a valid legislative purpose. The distinction we are asked to hold unconstitutional is solely a judicial creation, and thus cannot claim the presumption in favor of a legislatively declared public policy. There can be no justification, nor has the State offered any, for special treatment of this isolated class. Even if the State were to attempt to treat as a special class subject to increased penalties those as to whom additional adverse information were discovered after the first sentencing, the short answer, as we have shown, would be that this is prohibited. As Judge Marshall said in *United States ex rel. Hetenyi v. Wilkins*, 348 F. 2d 844, 859 (2d Cir. 1965):

"It is difficult to understand how the fundamental unfairness inherent in allowing a prosecutor to 'do better a second time' (Mr. Justice Frankfurter, concurring in *Brock v. North Carolina*, supra, 344 U. S. [424] at 429, 73 S. Ct. [349], at 351, 97 L. Ed. 456) is mitigated by conditioning this second chance on a successful appeal by the accused."

¹⁸ See *Griffin v. People of State of Illinois*, 351 U. S. 12, 18, 76 S. Ct. 585, 590, 100 L. Ed. 891 (1956), holding that even though "a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all," it cannot, without violating the due process and equal protection clauses, grant appellate review in such a way that some convicted defendants are discriminated against. This thought was further amplified by Justice Frankfurter, concurring in the judgment:

Even if the State's policy is to prevent insubstantial appeals, limiting the class to successful appellants would not be a rational means of accomplishing this purpose, since it has too broad a sweep—chilling meritorious appeals as well as frivolous ones. The inequity of such a system is apparent when it is realized that only prisoners whose appeals have been found meritorious are subjected to the peril of a higher resentence. Ironically, those whom the State admits having initially denied a fair trial are the only ones who stand to receive greater punishment. Thus, the threatened class is both underinclusive, in that those who do not pursue post-conviction remedies might also have been too leniently sentenced, and overinclusive, since not all bearing the risk (and thus deterred from attacking an unconstitutional conviction) were originally dealt with too lightly.¹⁹

IV. *Double Jeopardy*

[4] In view of the foregoing, we need not rest our decision on double jeopardy grounds. We are persuaded, however, that the constitutional protection against double

"[N]either the fact that a State may deny the right of appeal altogether nor the right of a State to make an appropriate classification; • • • nor the right of a State to lay down conditions it deems appropriate for criminal appeals, sanctions differentiations by a State that have no relation to a rational policy of criminal appeal or authorizes the imposition of conditions that offend the deepest presuppositions of our society."

351 U. S. at 21-22, 76 S. Ct. at 592. See also *Douglas v. State of California*, 372 U. S. 353, 365, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963) (dissenting opinion).

¹⁹ Tussman & tenBroek, *The Equal Protection of the Laws*, 37 Calif. L. Rev. 341, 344-53 (1949).

jeopardy would also be violated if an increased sentence or a denial of credit is permitted on retrial.²⁰

[5] Double jeopardy, rather than being a single doctrine, is actually comprised of three separate though related rules,²¹ prohibiting (1) reprosecution for the same offense following acquittal,²² (2) reprosecution for the same offense following conviction,²³ and (3) multiple punishment for the

²⁰ We find ourselves in full accord with the Second Circuit in *United States ex rel. Hetenyi v. Wilkins*, 348 F. 2d 844 (2d Cir. 1965), as to the resolution of the issue of whether the double jeopardy clause of the Fifth Amendment is applicable to the states. That court concluded that at least certain of the policies militating against placing a defendant twice in jeopardy are "incompatible with due process of law." *Id.* at 850. As that circuit found true of the multiple prosecutions to which Hetenyi was subjected, similarly, we think that the North Carolina practice of permitting an accused, who has successfully appealed his conviction, to bear the risk of an increased sentence:

"[i]s that kind of double jeopardy . . . [which] has subjected him [to] a hardship so acute and shocking that our policy will not endure it . . . [and] violate[s] those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.'"

Palko v. Connecticut, 302 U. S. 319, 328, 58 S. Ct. 149, 153, 82 L. Ed. 288 (1937).

²¹ See Comment, *Twice in Jeopardy*, 75 Yale L. J. 262 (1965).

²² *United States v. Ball*, 163 U. S. 662, 671, 16 S. Ct. 1192, 41 L. Ed. 300 (1896). See *Green v. United States*, 355 U. S. 184, 35 Cal. Rptr. 77 (1957), for the doctrine of "implied acquittal." This doctrine has been expanded to include punishment as well as degree of offense. *People v. Henderson*, 60 Cal. 2d 482, 35 Cal. Rptr. 77, 386 P. 2d 677 (1963).

²³ E.g., *In re Nielson*, 131 U. S. 176, 9 S. Ct. 672, 33 L. Ed. 118 (1889). Cf. *Downum v. United States*, 372 U. S. 734, 83 S. Ct. 1033, 10 L. Ed. 2d 100 (1963) (reprosecution barred following mistrial due to actions of the government).

same offense.²⁴ In *Green v. United States*, 355 U. S. 184, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957), the Supreme Court invoked the first rule, that an accused may not be reprosecuted for the offense of which he was acquitted at the first trial. The Court held that the double jeopardy clause precluded a retrial for first-degree murder following defendant's successful appeal from his conviction of second-degree murder, on the theory that the jury in the first trial, by returning a verdict of second-degree murder, *impliedly acquitted* him of the charge of first-degree murder.

[6] In a footnote, the *Green* majority declared—without further explanation—that *Stroud v. United States*, 251 U. S. 15, 40 S. Ct. 50, 64 L. Ed. 103 (1919), was “clearly distinguishable.”²⁵ 355 U. S. at 195, n. 15, 78 S. Ct. 221,

²⁴ E.g., *Ex parte Lange*, 85 U. S. (18 Wall.) 163, 21 L. Ed. 872 (1873). See *Louisiana ex rel. Francis v. Resweber*, 329 U. S. 459, 462, 67 S. Ct. 374, 91 L. Ed. 422 (1947).

²⁵ Justice Frankfurter, however, maintained that it was all but impossible to distinguish the two situations:

“As a practical matter and on any basis of human values, it is scarcely possible to distinguish a case in which the defendant is convicted of a greater offense from one in which he is convicted of an offense that has the same name as that of which he was previously convicted but carries a significantly different punishment, namely death rather than imprisonment.”

355 U. S. at 213, 78 S. Ct. at 237 (dissenting opinion). The Supreme Court of California, in *People v. Henderson*, 60 Cal. 2d 482, 35 Cal. Rptr. 77, 386 P. 2d 677 (1963), agreed with Justice Frankfurter that *Stroud* had been vitiated by *Green*. Justice Traynor, speaking for the majority, therefore held that an accused may not be given a more severe sentence on retrial obtained after a successful attack on his first conviction. The rationale appears to be that in fixing the punishment at imprisonment for life, the defendant was “acquitted” of the death penalty and hence was protected by the double jeopardy prohibition from “retrial” on the greater of the alternative punishments. (The double jeopardy provision in the California constitution is substantially identical to that of the Fifth Amendment, so that the court did not have

2 L. Ed. 2d 199. There the defendant was retried for first degree murder and sentenced to death, following reversal of his prior conviction, for which he had received a sentence of life imprisonment. From a reading of the *Stroud* opinion, it appears that the case was argued to the Court on the theory that the defendant was put twice in jeopardy for the same offense merely by being retried on an indictment for first degree murder.²⁶ There is no indication that the Court was presented with the argument that the risk of an increased penalty on retrial violates the double jeopardy clause by being a double punishment for the same offense. *Stroud* thus stands for no more than the well-established proposition that the double jeopardy clause does not entitle a defendant who successfully attacks his conviction to absolute immunity from reprosecution.²⁷

It is clear, therefore, that the Court was concerned in *Green* only with that aspect of double jeopardy which pro-

to determine whether the Fifth Amendment provision itself was applicable.)

The California courts have not limited the application of the double jeopardy provision to cases in which the prosecutor has sought on the second trial to raise the punishment to the death penalty, but have also followed the rule laid down in *Henderson* where longer prison sentences are involved. *People v. Nanga-Parbet Ali*, 57 Cal. Rptr. 348, 424 P. 2d 932 (Calif. Sup. Ct. Mar. 3, 1967); *In re Ferguson*, 233 Cal. App. 2d 79, 43 Cal. Rptr. 325 (1965).

²⁶ The Court discussed only that aspect of double jeopardy which protects a defendant from a "second trial" and held that since the accused had himself appealed his conviction and sought a new trial, he was not entitled to invoke the double jeopardy provision of the Constitution. 251 U. S. at 18, 40 S. Ct. 50.

²⁷ See, e.g., *Bryan v. United States*, 338 U. S. 552, 70 S. Ct. 317, 94 L. Ed. 335 (1950); *United States v. Ball*, 163 U. S. 662, 16 S. Ct. 1192, 41 L. Ed. 300 (1896).

hibits multiple *prosecutions* for the same offense, and was not faced with the precise question that is before us—whether a harsher punishment following retrial for the same offense is prohibited by the double jeopardy clause.

Patton analogizes his situation to that in *Green*, asserting that as Green was “impliedly acquitted” of the *greater degree* of murder when he was convicted of the lesser degree of that offense, similarly, Patton was “acquitted” of any *higher penalty* when he was sentenced to twenty years’ imprisonment. And as the accused in *Green* was protected by the double jeopardy clause from retrial for *first degree* murder, by a parity of reasoning, Patton contends that the double jeopardy clause protects him from being “retried” for the penalty of which he had been “acquitted” at his first trial, namely, anything between the twenty years he actually received and the statutory maximum. On retrial, he asserts, he could only be given “up to the degree of punishment of which he was originally convicted.”²⁸

Defendant recognizes, and we agree, that to maintain that he was “acquitted” at the first trial of any penalty greater than twenty years, is as much a fiction as that he has “waived” the benefit of his initial sentence by appealing his conviction.²⁹ For this reason, we do not rest solely on the “implied acquittal” doctrine, preferring to emphasize a somewhat different aspect of double jeopardy—the prohibition against multiple punishment. See *Ex parte Lange*, 85 U. S. (18 Wall.) 163, 21 L. Ed. 872 (1873).³⁰ It is this

²⁸ Van Alstyne, *op. cit. supra*, note 17, at 635. See *Whaley v. North Carolina*, 379 F. 2d 221 (decided this day).

²⁹ See Part II, *supra*.

³⁰ “If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence. And * * * there has never been any doubt

aspect which has been consistently relied upon to prohibit an increase in a defendant's sentence, once service has commenced. E.g., *Ex parte Lange*, supra; *United States v. Benz*, 282 U. S. 304, 307, 51 S. Ct. 113, 75 L. Ed. 354 (1931); *United States v. Sacco*, 367 F. 2d 368 (2d Cir. 1966); *United States v. Adams*, 362 F. 2d 210 (6th Cir. 1966); *Kennedy v. United States*, 330 F. 2d 26 (9th Cir. 1964).

We perceive no constitutionally significant distinction between the increases prohibited in the cases cited above and an increase in punishment following retrial. Thus, unless a defendant is held to waive this double jeopardy protection in seeking a new trial, a harsher penalty may not be imposed. And we have already declared, in Part II of this opinion, that we decline to predicate a prisoner's exercise of his right to seek a new trial on the fiction that he has "waived" the benefits of his initial sentence, because of the restrictive effect this has on access to post-conviction remedies.³¹ This is in accord with this circuit's decision

of * * * [this rule's] entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offence.

* * *

[T]he Constitution was designed as much to prevent the criminal from being twice punished for the same offence as being twice tried for it."

85 U. S. at 168, 173, 21 L. Ed. 872. (Emphasis supplied.)

That the framers were concerned with multiple punishment is indicated by the text of the double jeopardy provision initially proposed by Madison, cited in *Green v. United States*, 355 U. S. 184, 201-202, 78 S. Ct. 221, 231 (1957) (dissenting opinion of Frankfurter, J.): "No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence * * *." (Emphasis supplied.)

³¹ The primary focus of the majority opinion in *Green* was not on protecting the accused from reprosecution per se, but on protecting his access to post-conviction remedies. See *United States*

in *United States v. Walker*, 346 F. 2d 428 (4th Cir. 1965), that, in seeking correction of an erroneous sentence,³² a defendant does not waive his double jeopardy right not to be subjected to multiple punishment. See *Walsh v. United States*, 374 F. 2d 421, 426 (9th Cir. 1967) and *Ekberg v. United States*, 167 F. 2d 380, 388 (1st Cir. 1948), discussed more extensively in *Whaley v. North Carolina*, 4 Cir., 379 F. 2d 221 (decided this day).

To summarize, we conclude that increasing Patton's punishment after the reversal of his initial conviction constitutes a violation of his Fourteenth Amendment rights in that it exacted an unconstitutional condition to the exercise of his right to a fair trial, arbitrarily denied him the equal protection of the law, and placed him twice in jeopardy of punishment for the same offense.

We affirm the District Court's order to release the defendant from confinement unless he is constitutionally resentenced by the state court to a term not exceeding 20 years from the date of his original sentence, passed on October 26, 1960, with full credit for the time already served.³³

Affirmed.

v. Ewell, 383 U. S. 116, 127-128, 86 S. Ct. 773, 780, 15 L. Ed. 2d 27 (1966) (dissenting opinion of Fortas, J.):

"Although the decision in *Green* was premised upon the Double Jeopardy Clause, its teaching has another dimension. *Green* also demonstrates this Court's concern to protect the right of appeal in criminal cases."

See also *Van Alstyne*, op. cit. supra, note 17, at 632.

³² See Note, 80 Harv. L. Rev. 891, 896-97 (1967), where this concept was developed with specific reference to the District Court's decision in the present case.

³³ Consequently, having now served nearly 7 years of his 20 year sentence, Patton is presently eligible to be considered for parole. See N. C. Gen. Stat. §148-58 (Replacement vol. 1964), which provides that a prisoner shall be eligible for parole after serving a fourth of a determinate sentence.

SUPREME COURT OF THE UNITED STATES

Nos. 413 AND 418.—OCTOBER TERM, 1968.

State of North Carolina et al.,	}	On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.
Petitioners,		
413 v. Clifton A. Pearce.		

Curtis M. Simpson, Warden,	}	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.
Petitioner,		
418 v. William S. Rice.		

[June 23, 1969.]

MR. JUSTICE STEWART delivered the opinion of the Court.

When at the behest of the defendant a criminal conviction has been set aside and a new trial ordered, to what extent does the Constitution limit the imposition of a harsher sentence after conviction upon retrial? That is the question presented by these two cases.

In No. 413 the respondent Pearce was convicted in a North Carolina court upon a charge of assault with intent to commit rape. The trial judge sentenced him to prison for a term of 12 to 15 years. Several years later he initiated a state post-conviction proceeding which culminated in the reversal of his conviction by the Supreme Court of North Carolina, upon the ground that an involuntary confession had unconstitutionally been admitted in evidence against him, 266 N. C. 234, 145 S. E. 2d 918. He was retried, convicted, and sentenced by the trial judge to an eight-year prison term, which, when added to the time Pearce had already spent in prison, the parties agree amounted to a longer total sentence than

that originally imposed.¹ The conviction and sentence were affirmed on appeal. 268 N. C. 707, 151 S. E. 2d 571. Pearce then began this habeas corpus proceeding in the United States District Court for the Eastern District of North Carolina. That court held, upon the authority of a then very recent Fourth Circuit decision, *Patton v. North Carolina*, 381 F. 2d 636, cert. denied, 390 U. S. 905, that the longer sentence imposed upon retrial was "unconstitutional and void."² Upon the failure of the state court to resentence Pearce within 60 days, the federal court ordered his release. This order was affirmed by the United States Court of Appeals for the Fourth Circuit, 397 F. 2d 253, in a brief *per curiam* judgment citing its *Patton* decision, and we granted certiorari. 393 U. S. 922.

In No. 418 the respondent Rice pleaded guilty in an Alabama trial court to four separate charges of second degree burglary. He was sentenced to prison terms aggregating 10 years.³ Two and one-half years later the judgments were set aside in a state *coram nobis* proceeding, upon the ground that Rice had not been accorded his constitutional right to counsel. See *Gideon v. Wainwright*, 372 U. S. 335. He was retried upon three

¹ The approximate expiration date of the original sentence, assuming all allowances of time for good behavior, was November 13, 1969. The approximate expiration date of the new sentence, assuming all allowances of time for good behavior, was October 10, 1972.

² In *Patton*, the Court of Appeals for the Fourth Circuit had held that "increasing Patton's punishment after the reversal of his initial conviction constitutes a violation of his Fourteenth Amendment rights in that it exacted an unconstitutional condition to the exercise of his right to a fair trial, arbitrarily denied him the equal protection of the law, and placed him twice in jeopardy of punishment for the same offense." 381 F. 2d, at 646.

³ He was sentenced to four years in prison upon the first count, and two years upon each of the other three counts, the sentences to be served consecutively.

of the charges, convicted, and sentenced to prison terms aggregating 25 years.⁴ No credit was given for the time he had spent in prison on the original judgments. He then brought this habeas corpus proceeding in the United States District Court for the Middle District of Alabama, alleging that the state trial court had acted unconstitutionally in failing to give him credit for the time he had already served in prison, and in imposing grossly harsher sentences upon retrial. United States District Judge Frank M. Johnson, Jr., agreed with both contentions. While stating that he did "not believe that it is constitutionally impermissible to impose a harsher sentence upon retrial if there is recorded in the court record some legal justification for it," Judge Johnson found that Rice had been denied due process of law, because "[u]nder the evidence in this case, the conclusion is inescapable that the State of Alabama is punishing petitioner Rice for his having exercised his post-conviction right of review and for having the original sentences declared unconstitutional." 274 F. Supp. 116, 121, 122. The judgment of the District Court was affirmed by the United States Court of Appeals for the Fifth Circuit, "on the basis of Judge Johnson's opinion," 396 F. 2d 499, 500, and we granted certiorari. 393 U. S. 932.

The problem before us⁵ involves two related but analytically separate issues. One concerns the constitutional

⁴ He was sentenced to a prison term of 10 years on the first count, 10 years on the second count, and five years on the fourth count, the sentences to be served consecutively. The third count was dropped upon motion of the prosecution, apparently because the chief witness for the prosecution had left the State.

⁵ The United States Courts of Appeals have reached conflicting results in dealing with the basic problem here presented. In addition to the Fourth and Fifth Circuit decisions here under review, see *United States v. Marano*, 374 F. 2d 583 (C. A. 1st Cir.); *United*

limitations upon the imposition of a more severe punishment after conviction for the same offense upon retrial. The other is the more limited question whether, in computing the new sentence, the Constitution requires that credit must be given for that part of the original sentence already served. The second question is not presented in *Pearce*, for in North Carolina it appears to be the law that a defendant must be given full credit for all time served under the previous sentence. *State v. Stafford*, 274 N. C. 519, 164 S. E. 2d 371; *State v. Paige*, 272 N. C. 417, 158 S. E. 2d 522; *State v. Weaver*, 264 N. C. 681, 142 S. E. 2d 633. In any event, *Pearce* was given such credit.⁶ Alabama law, however, seems to reflect a different view. *Aaron v. State*, 43 Ala. App. 450, 192 So. 2d 456; *Ex parte Merkes*, 43 Ala. App. 640,

States v. Coke, 404 F. 2d 836 (C. A. 2d Cir.); *Starnes v. Russell*, 378 F. 2d 808 (C. A. 3d Cir.); *United States v. White*, 382 F. 2d 445 (C. A. 7th Cir.); *Walsh v. United States*, 374 F. 2d 421 (C. A. 9th Cir.); *Newman v. Rodriguez*, 375 F. 2d 712 (C. A. 10th Cir.). The state courts have also been far from unanimous. Although most of the States seem either not to have considered the problem, or to have imposed only the generally applicable statutory limits upon sentences after retrial, a few States have prohibited more severe sentences upon retrial than were imposed at the original trial. See *People v. Henderson*, 60 Cal. 2d 482, 386 P. 2d 677, 35 Cal. Rptr. 77; *People v. Ali*, 66 Cal. 2d 277, 424 P. 2d 932, 57 Cal. Rptr. 348; *State v. Turner*, 247 Ore. 301, 429 P. 2d 565; *State v. Wolf*, 46 N. J. 301, 216 A. 2d 586; *State v. Leonard*, 39 Wis. 2d 461, 159 N. W. 2d 577.

⁶ "THE COURT: It is the intention of this Court to give the defendant a sentence of fifteen years in the State Prison; however, it appears to the Court from the records available from the Prison Department that the defendant has served 6 years, 6 months and 17 days flat and gain time combined, and the Court in passing sentence in this case is taking into consideration the time already served by the defendant. IT IS THE JUDGMENT of this Court that the defendant be confined to the State's Prison for a period of eight years."

198 So. 2d 789.⁷ And respondent Rice, upon being re-sentenced, was given no credit at all for the two and one-half years he had already spent in prison.

We turn first to the more limited aspect of the question before us—whether the Constitution requires that, in computing the sentence imposed after conviction upon retrial, credit must be given for time served under the original sentence. We then consider the broader question of what constitutional limitations there may be upon the imposition of a more severe sentence after reconviction.

I.

The Court has held today, in *Benton v. Maryland*, ante, p. —, that the Fifth Amendment guarantee against double jeopardy is enforceable against the States through the Fourteenth Amendment. That guarantee has been said to consist of three separate constitutional protections.⁸ It protects against a second prosecution for the same offense after acquittal.⁹ It protects against a second prosecution for the same offense after conviction.¹⁰ And it protects against multiple punishments for the same offense.¹¹ This last protection is what is necessarily

⁷ A recent opinion of the Supreme Court of Alabama indicates that state law does require credit for time served under the original sentence at least to the extent that the total period of imprisonment would otherwise exceed the absolute statutory maximum that could be imposed for the offense in question. "Without such credit defendant would be serving time beyond the maximum fixed by law for the offense . . . charged in the indictment." *Ex parte State of Alabama, ex rel. Attorney General* (Oct. 3, 1968).

⁸ See Note, *Twice in Jeopardy*, 75 Yale L. J. 262, 265-266 (1965).

⁹ *United States v. Ball*, 163 U. S. 662; *Green v. United States*, 355 U. S. 184.

¹⁰ *In re Nielson*, 131 U. S. 176.

¹¹ *Ex parte Lange*, 18 Wall. 163; *United States v. Benz*, 282 U. S. 304, 307; *United States v. Sacco*, 367 F. 2d 368; *United States v. Adams*, 362 F. 2d 210; *Kennedy v. United States*, 330 F. 2d 26.

implicated in any consideration of the question whether, in the imposition of sentence for the same offense after retrial, the Constitution requires that credit must be given for punishment already endured. The Court stated the controlling constitutional principle almost 100 years ago, in the landmark case of *Ex parte Lange*, 18 Wall. 163, 168:

"If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence. And . . . there has never been any doubt of [this rule's] entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offence.

"[T]he Constitution was designed as much to prevent the criminal from being twice punished for the same offence as from being twice tried for it." *Id.*, at 173.

We think it is clear that this basic constitutional guarantee is violated when punishment already exacted for an offense is not fully "credited" in imposing sentence upon a new conviction for the same offense. The constitutional violation is flagrantly apparent in a case involving the imposition of a maximum sentence after reconviction. Suppose, for example, in a jurisdiction where the maximum allowable sentence for larceny is 10 years imprisonment, a man succeeds in getting his larceny conviction set aside after serving three years in prison. If, upon reconviction, he is given a 10-year sentence, then, quite clearly, he will have received multiple punishments for the same offense. For he will have been compelled to serve separate prison terms of three years and 10 years, although the maximum single

punishment for the offense is 10 years imprisonment. Though not so dramatically evident, the same principle obviously holds true whenever punishment already endured is not fully subtracted from any new sentence imposed.¹²

We hold that the constitutional guarantee against multiple punishments for the same offense absolutely requires that punishment already exacted must be fully "credited"¹³ in imposing sentence upon a new conviction for the same offense. If, upon a new trial, the defendant is acquitted, there is no way the years he spent in prison can be returned to him. But if he is reconvicted, those years can and must be returned—by subtracting them from whatever new sentence is imposed.

II.

To hold that the second sentence must be reduced by the time served under the first is, however, to give but a partial answer to the question before us.¹⁴ We turn,

¹² We have spoken in terms of imprisonment, but the same rule would be equally applicable where a fine had been actually paid upon the first conviction. Any new fine imposed upon reconviction would have to be decreased by the amount previously paid.

¹³ Such credit must, of course, include the time credited during service of the first prison sentence for good behavior, etc.

¹⁴ In most situations, even when time served under the original sentence is fully taken into account, a judge can still sentence a defendant to a longer term in prison than was originally imposed. That is true with respect to both cases before us. In the *Pearce* case, credit for time previously served was given. See n. 6, *supra*. In the *Rice* case credit for the two and one-half years served was not given, but even if it had been, the sentencing judge could have reached the same result that he did reach simply by sentencing Rice to 27½ years in prison. That would have been permissible under Alabama law, since Rice was convicted of three counts of second-degree burglary, and on each count a maximum sentence of 10 years imprisonment could have been imposed. Ala. Code, Tit. 14, § 86 (1958).

therefore, to consideration of the broader problem of what constitutional limitations there may be upon the general power of a judge to impose upon reconviction a longer prison sentence than the defendant originally received.

A.

Long-established constitutional doctrine makes clear that, beyond the requirement already discussed, the guarantee against double jeopardy imposes no restrictions upon the length of a sentence imposed upon reconviction. At least since 1896, when *United States v. Ball*, 163 U. S. 662, was decided, it has been settled that this constitutional guarantee imposes no limitations whatever upon the power to *retry* a defendant who has succeeded in getting his first conviction set aside.¹⁵ "The principle that this provision does not preclude the Government's retrying a defendant whose conviction is set aside because of an error in the proceedings leading to conviction is a well-established part of our constitutional jurisprudence." *United States v. Tateo*, 377 U. S. 463, 465. And at least since 1919, when *Stroud v. United States*, 251 U. S. 15, was decided, it has been settled that a corollary of the power to retry a defendant is the power, upon the defendant's reconviction, to impose whatever sentence may be legally authorized, whether or not it is greater than the sentence imposed after the first conviction.¹⁶ "That a defendant's conviction is overturned

¹⁵ See, e. g., *Stroud v. United States*, 251 U. S. 15; *Bryan v. United States*, 338 U. S. 552; *Forman v. United States*, 361 U. S. 416; *United States v. Tateo*, 377 U. S. 463.

¹⁶ In *Stroud* the defendant was convicted of first degree murder and sentenced to life imprisonment. After reversal of this conviction, the defendant was retried, reconvicted of the same offense, and sentenced to death. This Court upheld the conviction against the defendant's claim that his constitutional right not to be twice put in jeopardy had been violated. See also *Murphy v. Massachu-*

on collateral rather than direct attack is irrelevant for these purposes, see *Robinson v. United States*, 144 F. 2d 392, 396, 397, aff'd on another ground, 324 U. S. 282." *United States v. Tateo*, *supra*, at 466.

Although the rationale for this "well-established part of our constitutional jurisprudence" has been variously verbalized, it rests ultimately upon the premise that the original conviction has, at the defendant's behest, been wholly nullified and the slate wiped clean. As to whatever punishment has actually been suffered under the first conviction, that premise is, of course, an unmitigated fiction, as we have recognized in Part I of this opinion.¹⁷ But, so far as the conviction itself goes, and that part of the sentence that has not yet been served, it is no more than a simple statement of fact to say that the slate *has* been wiped clean: The conviction *has* been set aside, and the unexpired portion of the original sentence will never be served. A new trial may result in an acquittal. But if it does result in a conviction, we cannot say that the constitutional guarantee against double jeopardy of its own weight restricts the imposition of an otherwise lawful single punishment for the offense in question. To hold to the contrary would be to cast doubt upon the whole validity of the basic principle enunciated in *United States v. Ball*, *supra*, and upon the unbroken line of decisions that have followed

setts, 177 U. S. 155; *Robinson v. United States*, 324 U. S. 282, affirming, 144 F. 2d 392. The Court's decision in *Green v. United States*, 355 U. S. 184, is of no applicability to the present problem. The *Green* decision was based upon the double jeopardy provision's guarantee against retrial for an offense of which the defendant was acquitted.

¹⁷ Cf. *King v. United States*, 98 F. 2d 291, 293-294: "The Government's brief suggests, in the vein of *The Mikado*, that because the first sentence was void appellant 'has served no sentence but has merely spent time in the penitentiary;' that since he should not have been imprisoned as he was, he was not imprisoned at all."

that principle for almost 75 years. We think those decisions are entirely sound, and we decline to depart from the concept they reflect.¹⁸

B.

The other argument advanced in support of the proposition that the Constitution absolutely forbids the imposition of a more severe sentence upon retrial is grounded upon the Equal Protection Clause of the Fourteenth Amendment. The theory advanced is that, since convicts who do not seek new trials cannot have their sentences increased, it creates an invidious classification to impose that risk only upon those who succeed in getting their original convictions set aside. The argument, while not lacking in ingenuity, cannot withstand close examination. In the first place, we deal here not with increases in existing sentences, but with the imposition of wholly new sentences after wholly new trials. Putting that conceptual nicety to one side, however, the problem before us simply cannot be rationally dealt with in terms of "classifications." A man who is retried after his first conviction has been set aside may be acquitted. If

¹⁸ "While different theories have been advanced to support the permissibility of retrial, of greater importance than the conceptual abstractions employed to explain the *Ball* principle are the implications of that principle for the sound administration of justice. Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution. In reality, therefore, the practice of retrial serves defendants' rights as well as society's interest." *United States v. Tateo*, 377 U. S. 463, 466.

convicted, he may receive a shorter sentence, he may receive the same sentence, or he may receive a longer sentence than the one originally imposed. The result may depend upon a particular combination of infinite variables peculiar to each individual trial. It simply cannot be said that a State has invidiously "classified" those who successfully seek new trials, any more than that the State has invidiously "classified" those prisoners whose convictions are *not* set aside by denying the members of that group the opportunity to be acquitted. To fit the problem of this case into an equal protection framework is a task too Procrustean to be rationally accomplished.

C.

We hold, therefore, that neither the double jeopardy provision nor the Equal Protection Clause imposes an absolute bar to a more severe sentence upon reconviction. A trial judge is not constitutionally precluded, in other words, from imposing a new sentence, whether greater or less than the original sentence, in the light of events subsequent to the first trial that may have thrown new light upon the defendant's "life, health, habits, conduct, and mental and moral propensities." *Williams v. New York*, 337 U. S. 241, 245. Such information may come to the judge's attention from evidence adduced at the second trial itself, from a new presentence investigation, from the defendant's prison record, or possibly from other sources. The freedom of a sentencing judge to consider the defendant's conduct subsequent to the first conviction in imposing a new sentence is no more than consonant with the principle, fully approved in *Williams v. New York*, *supra*, that a State may adopt the "prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime." *Id.*, at 247.

To say that there exists no absolute constitutional bar to the imposition of a more severe sentence upon retrial

is not, however, to end the inquiry. There remains for consideration the impact of the Due Process Clause of the Fourteenth Amendment.

It can hardly be doubted that it would be a flagrant violation of the Fourteenth Amendment for a state trial court to follow an announced practice of imposing a heavier sentence upon every reconvicted defendant for the explicit purpose of punishing the defendant for his having succeeded in getting his original conviction set aside. Where, as in each of the cases before us, the original conviction has been set aside because of a constitutional error, the imposition of such a punishment, "penalizing those who choose to exercise" constitutional rights, "would be patently unconstitutional." *United States v. Jackson*, 390 U. S. 570, 581. And the very threat inherent in the existence of such a punitive policy would, with respect to those still in prison, serve to "chill the exercise of basic constitutional rights." *Id.*, at 582. See also *Griffin v. California*, 380 U. S. 609; cf. *Johnson v. Avery*, 393 U. S. 483. But even if the first conviction has been set aside for nonconstitutional error, the imposition of a penalty upon the defendant for having successfully pursued a statutory right of appeal or collateral remedy would be no less a violation of due process of law.¹⁹ "A new sentence, with enhanced punishment, based upon such a reason, would be a flagrant violation of the rights of the defendant." *Nichols v. United States*, 106 F. 672, 679. A court is "without right to . . . put a price on an appeal. A defendant's exercise of a right of appeal must be free and unfettered. . . . [I]t is unfair to use the great power given to the court to determine sentence to place a defendant in the dilemma

¹⁹ See Van Alstyne, In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant, 74 Yale L. J. 606 (1965); Note, Unconstitutional Conditions, 73 Harv. L. Rev. 1595 (1960).

of making an unfree choice." *Worcester v. Commissioner*, 370 F. 2d 713, 718. See *Short v. United States*, 344 F. 2d 550, 552. "This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts. *Griffin v. Illinois*, 351 U. S. 12; *Douglas v. California*, 372 U. S. 353; *Lane v. Brown*, 372 U. S. 477; *Draper v. Washington*, 372 U. S. 487." *Rinaldi v. Yeager*, 384 U. S. 305, 310-311.

Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.²⁰

²⁰ The existence of a retaliatory motivation would, of course, be extremely difficult to prove in any individual case. But data have been collected to show that increased sentences on reconviction are far from rare. See Note, Constitutional Law: Increased Sentence and Denial of Credit on Retrial Sustained Under the Traditional Waiver Theory, [1965] *Duke L. J.* 395. A touching bit of evidence showing the fear of such a vindictive policy was noted by the trial judge in *Patton v. North Carolina*, 256 F. Supp. 225, who quoted a letter he had recently received from a prisoner:

"Dear Sir:

"I am in the Mecklenburg County jail. Mr. _____ chose to re-try me as I knew he would.

"Sir the other defendant in this case was set free after serving 15 months of his sentence, I have served 34 months and now I am to be tried again and with all probability I will receive a heavier sentence then before as you know sir my sentence at the first trile

In order to assure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal.

We dispose of the two cases before us in the light of these conclusions. In No. 418 Judge Johnson noted that "the State of Alabama offers no evidence attempting to justify the increase in Rice's original sentences" 274 F. Supp., at 121. He found it "shocking that the State of Alabama has not attempted to explain or justify the increase in Rice's punishment—in these three cases, over threefold." *Id.*, at 121-122. And he found that "the conclusion is inescapable that the State of Alabama is punishing petitioner Rice for his having exercised his post-conviction right of review" *Id.*, at 122. In No. 413 the situation is not so dramatically clear. Nonetheless, the fact remains that neither at the time the increased sentence was imposed upon Pearce, nor at

was 20 to 30 years. I know it is usually the courts procedure to give a large sentence when a new trial is granted I guess this is to discourage Petitioners.

"Your Honor, I don't want a new trial I am afraid of more time"

"Your Honor, I know you have tried to help me and God knows I appreciate this but please sir don't let the state re-try me if there is any way you can prevent it."

"Very truly yours"

Id., at 231, n. 7.

any stage in this habeas corpus proceeding, has the State offered any reason or justification for that sentence beyond the naked power to impose it. We conclude that in each of the cases before us, the judgment should be affirmed.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 413.—OCTOBER TERM, 1968.

State of North Carolina et al.,	} On Writ of Certiorari to	
Petitioners,		the United States Court
v.		of Appeals for the
Clifton A. Pearce.	} Fourth Circuit.	

[June 23, 1969.]

MR. JUSTICE DOUGLAS, whom MR. JUSTICE MARSHALL joins, concurring.

Although I agree with the Court as to the reach of due process, I would go further. It is my view that if for any reason a new trial is granted and there is a conviction a second time, the second penalty imposed cannot exceed the first penalty, if respect is had for the guarantee against double jeopardy.

The theory of double jeopardy is that a person need run the gantlet only once. The gantlet is the risk of the range of punishment which the State or Federal Government imposes for that particular conduct. It may be a year to 25 years, or 20 years to life, or death. He risks the maximum permissible punishment when first tried. That risk having been faced once need not be faced again. And the fact that he takes an appeal does not waive his constitutional defense of former jeopardy to a second prosecution. *Green v. United States*, 355 U.S. 184, 191-193.

In the *Green* case, the defendant was charged with arson on one count and on a second count was charged either with first degree murder carrying a mandatory death sentence, or second degree murder carrying a maximum sentence of life imprisonment. The jury found him guilty of arson and second degree murder but the verdict was silent as to first degree murder. He appealed the conviction and obtained a reversal. On a remand he was tried again. This time he was con-

victed of first degree murder and sentenced to death—hence his complaint of former jeopardy. We held that the guarantee of double jeopardy applied and that the defendant, having been “in direct peril of being convicted and punished for first degree murder at his first trial” could not be “forced to run the gantlet” twice. 355 U. S., at p. 180.

It is argued that that case is different because there were two different crimes with different punishments provided by statute for each one. That, however, is a matter of semantics. “It is immaterial to the basic purpose of the constitutional provision against double jeopardy whether the Legislature divides a crime into different degrees carrying different punishments, or allows the court or jury to fix different punishments for the same crime.” *California v. Henderson*, 60 Cal. 2d 482, 497, 35 Cal. Rptr. 77, — (1963) (Traynor, J.).

From the point of view of the individual and his liberty, the risk here of getting from one to 15 years for specified conduct is different only in degree from the risk in *Green* of getting a life imprisonment or capital punishment for specified conduct. Indeed, that matter was well understood by the dissenters in *Green*:

“As a practical matter, and on any basis of human values, it is scarcely possible to distinguish a case in which the defendant is convicted of a greater offense from one in which he is convicted of an offense that has the same name as that of which he was previously convicted but carries a significantly different punishment, namely death rather than imprisonment.” 355 U. S., at 213 (Frankfurter, J., dissenting).¹

¹ “With the benefit of *Green v. United States* . . . there is support emerging in favor of a broad double jeopardy rule which would protect all federal and state convicts held in prison under erroneous

The defendants in the present cases at the first trial faced the risk of maximum punishment and received less. In the second trial they were made to run the gantlet twice, since the Court today holds that the penalties can be increased.

It was established, at an early date, that the Fifth Amendment was designed to prevent an accused from running the risk of "double punishment." *United States v. Ewell*, 383 U. S. 116, 124. When Madison introduced to the First Congress his draft of what became the Double Jeopardy Clause, it read:

"No person shall be subject, except in case of impeachment, to *more than one punishment* or one trial for the same offense" 1 Annals of Cong. 434.

The phrasing of that proposal was changed at the behest of those who feared that the reference to but "one trial" might prevent a convicted man from obtaining a new trial on writ of error. 1 Annals of Cong. 753. But that change was not intended to alter the ban against double punishment. Sigler, *A History of Double Jeopardy*, 7 Am. J. Legal Hist. 283, 304-306 (1963).

"By forbidding that no person shall 'be subject for the same offense to be twice put in jeopardy of life or limb' [the safeguard of the Fifth Amendment

convictions or sentences from harsher resentencing following retrial. . . . [T]he technical argument applying that rule would be as follows: When a particular penalty is selected from a range of penalties prescribed for a given offense, and when that penalty is imposed upon the defendant, the judge or jury is impliedly 'acquitting' the defendant of a greater penalty, just as the jury in *Green* impliedly acquitted the accused of a greater degree of the same offense." Van Alstyne, *In Gideon's Wake: Harsher Penalties and the 'Successful' Criminal Appellant*, 74 Yale L. J. 606, 634-635 (1965).

against double punishment] guarded against the repetition of history by . . . punishing [a man] for an offense when he had already suffered the punishment for it." *Roberts v. United States*, 320 U. S. 264, 276 (Frankfurter, J., dissenting).²

The inquiry, then, is into the meaning of "double" or "multiple" punishment. In *Ex parte Lange*, 18 Wall. 163, the petitioner had been sentenced to one year imprisonment and \$200 in fines, under a federal statute providing for a maximum penalty of one year imprisonment or \$200 in fines. On writ of habeas corpus five days later, the trial court re-examined its own prior sentence and reset it, instead, at one year imprisonment without credit for time already served. This Court, on certiorari, ordered petitioner discharged altogether. It reasoned that the trial court had power to impose a sentence of either imprisonment or fine. Because the petitioner had paid the fine, he had already suffered complete punishment for his crime and could not be subjected to further sanction:

"If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense. And though there have been nice questions in the application of this rule to cases in which the act charged was such as to come within the definition of more than one statutory offense, or to bring the party within the jurisdiction of more than one court, there has never been any doubt of its entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offense." 18 Wall., at 168.

² "Our minds rebel against permitting the same sovereignty to punish an accused twice for the same offense." *Francis v. Resweber*, 329 U. S. 459, 462 (opinion by Reed, J.). See also *Williams v. Oklahoma*, 358 U. S. 576, 584-586.

Ex parte Lange left it somewhat in doubt, whether the ban on double punishment applied only to situations in which the second sentence was added to one that had been completely served; or whether it also applied to the case where the second sentence was added to one still being served. It was not until *United States v. Benz*, 282 U. S. 304, that the Court clarified its position. In that case, having initially set the defendant's sentence at 10 months, the trial court later reduced the sentence to six months. The Government appealed, and the question was certified to this Court, whether a reduction in sentence violated the Double Jeopardy Clause:

"The general rule is that judgments, decrees and orders are within the control of the court during the term at which they were made. . . . The rule is not confined to civil cases, but applies in criminal cases as well, *provided that the punishment be not augmented*. *Ex parte Lange*, 18 Wall, 163, 167-174 [additional citations omitted]. In the present case the power of the court was exercised to mitigate the punishment, not to increase it, and is thus brought within the limitations.

"The distinction that the court during the same term may amend a sentence so as to mitigate it the punishment, but not so as to increase it, is not based upon the ground that the court has lost control of the judgment in the latter case, but upon the ground that to increase the penalty is to subject the defendant to double punishment for the same offense in violation of the Fifth Amendment to the Constitution This is the basis of the decision in *Ex parte Lange, supra*." 282 U. S., at 307.

The governing principle has thus developed that a convicted man may be retried after a successful appeal, *Bryan v. United States*, 338 U. S. 552; that he may run the risk, on retrial, of receiving a sentence as severe as

that previously imposed, *United States v. Ball*, 163 U. S. 662; and that he may run the risk of being tried for a separate offense, *Williams v. Oklahoma*, 358 U. S. 576. But with all deference I submit that the State does not, because of prior error, have a second chance to obtain an enlarged sentence.³ Where a man successfully attacks

³ "I read the Double Jeopardy Clause as applying a strict standard. . . . It is designed to help equalize the position of government and the individual to discourage abuse of the awesome power of society. Once a trial starts, jeopardy attaches. The prosecution must stand or fall on its performance at the trial. . . . The policy of the Bill of Rights is to make rare indeed the occasions when the citizen can for the same offense be required to run the gauntlet twice. The risk of judicial arbitrariness rests where, in my view, the Constitution put it—on the Government." *Gori v. United States*, 367 U. S. 364, 372-373 (DOUGLAS, J., dissenting). This Court has never held anything to the contrary. While *Stroud v. United States*, 251 U. S. 15, involved a defendant who received the death penalty upon retrial after successfully appealing a sentence of life imprisonment,

"it appears that the case was argued . . . on the theory that the defendant was put twice in jeopardy for the same offense merely by being retried on an indictment for first degree murder. There is no indication that the Court was presented with the argument that the risk of an increased penalty on retrial violates the double jeopardy clause by being a double punishment for the same offense. *Stroud* thus stands for no more than the well-established proposition that the double jeopardy clause does not entitle a defendant who successfully attacks his conviction to absolute immunity from reprosecution." *Patton v. State of North Carolina*, 381 F. 2d 636 (C. A. 4th Cir. 1967).

To the extent that *Stroud* stands for anything to the contrary, it has been vitiated by *Green v. United States*, *supra*. *People v. Henderson*, 60 Cal. 2d 482, 35 Cal. Rptr. 77 (1963). Other cases involving the matter of increased sentencing upon retrial have either been ones in which the matter was not before the court because the parties did not raise it, *Robinson v. United States*, 144 F. 2d 392 (C. A. 6th Cir. 1944), *aff'd*, 324 U. S. 282, or because it was not necessary to a decision, *Fay v. Noia*, 372 U. S. 391, 440; or ones involving state cases in which this Court applied a loose standard

a sentence that he has already "fully served" (*Street v. New York*, 394 U. S. —), the State cannot create an additional sentence and send him back to prison. *Ex parte Lange, supra*. Similarly, where a defendant successfully attacks a sentence that he has begun to serve, the State cannot impose an added sentence by sending him to prison for a greater term.*

of due process in lieu of the uncompromising dictates of the Double Jeopardy Clause, *Palko v. Connecticut*, 302 U. S. 319; *Francis v. Resweber*, 329 U. S. 469.

* Among the federal courts, some agree that increased sentencing upon retrial constitutes double jeopardy, *Patton v. North Carolina*, 381 F. 2d 636 (C. A. 4th Cir. 1967); *United States v. Adams*, 362 F. 2d 210 (C. A. 6th Cir. 1966). Other courts of appeals have found it unnecessary to resolve the matter but have indicated that, properly presented, they too would prohibit increased sentencing as a violation of the ban against double jeopardy. Compare *Walsh v. United States*, 374 F. 2d 421 (C. A. 9th Cir. 1967), with *Jack v. United States*, 387 F. 2d 471 (C. A. 9th Cir. 1967); *Castle v. United States*, 399 F. 2d 642 (C. A. 5th Cir. 1968). Still other circuits have found the Double Jeopardy Clause unavailing and would permit increased sentencing whenever justified by newly revealed evidence, *Marano v. United States*, 374 F. 2d 583 (C. A. 1st Cir. 1967), and *United States v. Coke*, 404 F. 2d 836 (C. A. 2d Cir. 1969); whenever supported by standards of rational sentencing, absent an intent to penalize the defendant for seeking a new trial, *United States v. White*, 382 F. 2d 445 (C. A. 7th Cir. 1967); or whenever considered appropriate by the sentencing judge, *Short v. United States*, 344 F. 2d 550 (C. A. D. C. Cir. 1965); *Starnes v. Russell*, 378 F. 2d 808 (C. A. 3d Cir. 1967); and *Newman v. Rodriguez*, 375 F. 2d 712 (C. A. 10th Cir. 1967).

Among the States, the governing standards are similarly mixed. An increase in sentence where the defendant can show that it reflects an intent to punish him for seeking a new trial in one instance, *State v. White*, 262 N. C. 52, 136 S. E. 2d 205 (1964). Of the States that prohibit increased sentencing upon retrial, some rest on state standards of double jeopardy, *People v. Henderson*, 60 Cal. 2d 482, 386 P. 2d 677 (1963); some ground that result in the "chilling effect" that a contrary rule would have on the right "to correct an erroneously conducted initial trial." *State v. Wolff*, 46 N. J. 301,

The ban on double jeopardy has its roots deep in the history of occidental jurisprudence. "Fear and abhorrence of governmental power to try people twice for the

216 A. 2d 586 (N. J. 1966), and *State v. Turner*, — Ore. —, 429 P. 2d 565 (1967). Still others have reached that result either "as a matter of judicial policy," *State v. Holmes*, — Minn. —, 161 N. W. 2d 650 (1968), or because of state statute, *Rush v. State*, — Ark. —, 395 S. W. 2d 3 (1965).

Some States, evidently for reasons other than double jeopardy, prohibit increased sentencing except where affirmatively justified by newly developed evidence, *People v. Miller*, 12 Mich. App. 28, 162 N. W. 2d 282; *People v. Thiel*, 29 App. Div. 2d 913, 289 N. Y. S. 2d 879; and *State v. Leonard*, 30 Wis. 2d 461, 159 N. W. 2d 577 (1968).

Although unwilling to place a ceiling over the sentencing at retrial, some States do allow credit for time already served, *Tilghman v. Culver*, — Fla. —, 99 So. 2d 282 (1957) (based on double jeopardy); *Moore v. Buchko*, 379 Mich. 624, 154 N. W. 2d 437 (1967) (based on a local statute); *State v. Boles*, 159 S. E. 2d 36 (W. Va. 1968) (based on due process and equal protection); *Gray v. Hocker*, 269 F. Supp. 1004 (D. C. D. Nev. 1967) (based on equal protection); *Hill v. Holman*, 255 F. Supp. 924 (D. C. M. D. Ala. 1966) (based on due process). In the federal regime, the matter of credit is governed by statute, 18 U. S. C. § 3568.

Most States do permit increased sentencing on retrial without limit, *Ex parte Barnes*, 208 So. 2d 238 (Ala. Ct. of App. 1968); *Kohlfuss v. Warden of Connecticut State Prison*, — Conn. —, 183 A. 2d 626 (1962); *Bohannon v. District of Columbia*, 99 A. 2d 647 (D. C. Muni. Ct. of App. 1953); *Salisbury v. Grimes*, 223 Ga. 776, 158 S. E. 2d 412 (1967); *State v. Knesskern*, 303 Iowa 929, 210 N. W. 465 (1926); *State v. Morgan*, — La. —, 82 So. 711 (1919); *State v. Young*, 200 Kan. 20, 434 P. 2d 821 (1968); *Hobbs v. State*, 231 Md. 533, 191 A. 2d 238 (Md. Ct. of App. 1963); *Moon v. State*, 250 Md. 468, 243 A. 2d 563 (1968); *Hicks v. Commonwealth*, — Mass. —, 185 N. E. 2d 739 (1962); *Sanders v. State*, — Miss. —, 125 So. 2d 923 (1961); *Commonwealth ex rel. Wallace v. Burke*, 169 Pa. Super. Ct. 633, 84 A. 2d 254 (1951); *States v. Squires*, 149 S. E. 2d 601 (S. C. Sup. Ct. 1966).

Some States go so far as to deny credit against the new sentence for time already served in prison under the former one. *People v. Starks*, 395 Ill. 567, 71 N. E. 2d 23 (1947); *McDowell v. State*, —

same conduct is one of the oldest ideas found in western civilization." *Bartkus v. Illinois*, 359 U. S. 121, 151-155 (BLACK, J., dissenting). And its purposes are several. It prevents the State from using its criminal processes as an instrument of harassment to wear the accused out by a multitude of cases with accumulated trials. *Abbate v. United States*, 359 U. S. 187, 198-199 (opinion by BRENNAN, J.).

It serves the additional purpose of precluding the State, following *acquittal*, from successively retrying the defendant in the hope of securing a conviction. "The vice of this procedure lies in relitigating the same issue on the same evidence before two different juries with a man's innocence or guilt at stake . . . in the hope that they would come to a different conclusion." *Hoag v. New Jersey*, 356 U. S. 464, 474-475 (WARREN, C. J., dissenting.) "Harassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict are examples when jeopardy attaches." *Downum v. United States*, 372 U. S. 734, 736.

And finally, it prevents the State, following *conviction*, from retrying the defendant again in the hope of securing a more favorable penalty.

"This case presents an instance of the prosecution being allowed to harass the accused with repeated trials and convictions on the same evidence, until it achieves its desired result of a capital verdict." *Ciucci v. Illinois*, 356 U. S. 571, 573 (DOUGLAS, J., dissenting).

It is the latter purpose which is relevant here for in this case, the Court allows the State a second chance

Ind. —, 76 N. E. 2d 249 (1947); *State v. King*, 180 Neb. 631, 144 N. W. 2d 438 (1966); *Morgan v. Cox*, 75 N. M. 472, 406 P. 2d 347 (1965); *State v. Meadows*, — Tenn. —, 393 S. W. 2d 744 (1965).

to retry the defendant in the hope of securing a more favorable penalty.

"Why is it that, having once been tried and found guilty, he may ~~can~~ never be tried again for that offense? Manifestly, it is not the danger or jeopardy of being a second time being found guilty. It is the punishment that would legally follow the second conviction which is the real danger guarded against by the Constitution. But if, after judgment has been rendered on the conviction, and the sentence of that judgment executed on the criminal, he can be again sentenced on that conviction to another and different punishment, or to endure the same punishment a second time, is the constitutional restriction of any value?

"The argument seems to us irresistible, and we do not doubt that the Constitution was designed as much to prevent the criminal from being twice punished for the same offense as from being twice tried for it." *Ex parte Lange, supra*, at 173.

The Fourteenth Amendment would now prohibit North Carolina, after trial, from retrying or resentencing these defendants in the bald hope of securing a more favorable⁵ verdict. *Benton v. Maryland*, 394 U. S. —. But here, because these defendants were successful in appealing their convictions, the Court allows those States to do just that. It is said that events subsequent to the first trial⁶ may justify a new and greater sentence. Of course

⁵ "In *Swain v. United States*, 165 U. S. 553, this Court held that the President or commanding officer had power to return a case to a court-martial for an increase in sentence. If the double jeopardy provisions of the Fifth Amendment were applicable such a practice would be unconstitutional." *Reid v. Covert*, 354 U. S. 1, 37-38, n. 68 (opinion of BLACK, J.).

⁶ To rely on information that has developed after the initial trial gives the Government "continuing criminal jurisdiction" to supple-

that is true. But it is true, too, in *every* criminal case. Does that mean that the State should be allowed to re-open every verdict and readjust every sentence by coming forward with new evidence concerning guilt and punishment? If not, then why should it be allowed to do so merely because the defendant has taken the initiative in seeking an error-free trial? It is doubtless true that the State has an interest in adjusting sentences upward when it discovers new evidence to that effect. But the individual has an interest in remaining free of double punishment. And in weighing those interests against another, the Constitution has decided the matter in favor of the individual. See *United States v. Tateo*, 377 U. S. 463, 475 (Goldberg, J., dissenting).

ment its case against the defendant, far beyond the cut-off date set by its original prosecution. Consider the defendant whose sentence on retrial is enlarged because of antisocial acts committed in prison. To increase his sentence on that original offense because of wholly subsequent conduct is indirectly to hold him criminally responsible for that conduct.

SUPREME COURT OF THE UNITED STATES

Nos. 413 AND 418.—OCTOBER TERM, 1968.

State of North Carolina et al.,
Petitioners,
413 v.
Clifton A. Pearce. } On Writ of Certiorari to
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Curtis M. Simpson, Warden,
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William S. Rice. } On Writ of Certiorari to
the United States Court
of Appeals for the
Fifth Circuit.

[June 23, 1969.]

MR. JUSTICE BLACK, concurring and dissenting.

Respondent Pearce was convicted in a North Carolina court of assault with intent to rape and sentenced to serve 12 to 15 years in prison; respondent Rice pleaded guilty to four charges of burglary and was sentenced to serve a total of 10 years. After having served several years, Pearce was granted a new trial because a confession used against him was held to have been obtained in violation of his constitutional right not to be compelled to be a witness against himself; Rice's conviction was set aside because, although he was indigent, he had not been provided with a court-appointed lawyer at the time he made his guilty plea. Both respondents were retried and again convicted.¹ Rice's sentence was increased to 25 years, and no credit was given for time he had previously served; Pearce was in effect given a sentence of 15 years, but since credit was allowed for the time he had already served, his new sentence was set at eight years.

¹ At Rice's second trial one of the four charges originally pressed against him was dropped, and he was tried only on the remaining three.

I agree with the Court that the Double Jeopardy Clause prohibits the denial of credit for time already served. I also agree with the Court's rejection of respondents' claims that the increased sentences violate the Double Jeopardy and Equal Protection Clauses of the Constitution. It has been settled, as the Court correctly notes, that the double jeopardy provision does not limit the length of the sentence imposed upon reconviction. Nor is there any invidious discrimination in subjecting defendants who have had prior convictions set aside to the same punishment faced by people who have never been tried at all. Those who have had former convictions set aside must, like all others who have been convicted, be sentenced according to law, and a trial judge will normally conduct a full inquiry into the background, disposition, and prospects for rehabilitation of each defendant in order to set the appropriate sentence. Accordingly, these defendants are not denied equal protection when the State makes no provision for re-evaluation of sentences generally but permits the penalty set after retrials to be whatever penalty the trial judge finds to be appropriate, whether it be higher or lower than the sentence originally set.

The Court goes on, however, to hold that it would be a flagrant violation of due process for a "state trial court to follow an announced practice of imposing a heavy sentence upon every reconvicted defendant for the explicit purpose of punishing the defendant for his having succeeded in getting his original conviction set aside." *Ante*, at 12. This means, I take it, that a State cannot permit appeals in criminal cases and at the same time make it a crime for a convicted defendant to take or win an appeal. That would plainly deny due process of law, but not, as the Court's opinion implies, because the Court believes it to be an "unfair" practice. In the first place, the very enactment of two statutes

side by side, one encouraging and granting appeals and another making it a crime to win an appeal, would be contrary to the very idea of government, by law. It would create doubt, ambiguity, and uncertainty, making it impossible for citizens to know which one of the two conflicting laws to follow, and would thus violate one of the first principles of due process. Due process, moreover, is a guarantee that a man should only be tried and convicted in accordance with valid laws of the land. If a conviction is not valid under these laws, statutory and constitutional, a man has been denied due process and has a constitutional right to have the conviction set aside, without being deprived of life, liberty, or property as a result. For these two reasons, I agree that a state law imposing punishment on a defendant for taking a permissible appeal in a criminal case would violate the Due Process Clause, but not because of any supposed "unfairness." Since such a law could take effect not only by state legislative enactment but also by state judicial decision, I also agree that it would violate the Constitution for any judge to impose a higher penalty on a defendant solely because he had taken a legally permissible appeal.

On this basis there is a plausible argument for upholding the judgment in No. 418, setting aside the second sentence of respondent Rice, since the District Judge there found it "shocking" to him that the State offered no evidence to show why it had so greatly increased Rice's punishment—namely, from a 10-year sentence on four burglary charges at the first trial to a 25-year sentence on three burglary charges at the second trial. From these circumstances, the Federal District Judge appeared to find as a fact that the sentencing judge had increased Rice's sentence for the specific purpose of punishing Rice for invoking the lawfully granted post-conviction remedies. Since at this distance we

should ordinarily give this finding the benefit of every doubt, I would accept the Federal District Judge's conclusion that the State in this case attempted to punish Rice for lawfully challenging his conviction and would therefore, with some reluctance, affirm the decision of the Court of Appeals in that case. But this provides no basis for affirming the judgment of the Court of Appeals in No. 413, the case involving respondent Pearce. For in that case there is not a line of evidence to support the slightest inference that the trial judge wanted or intended to punish Pearce for seeking post-conviction relief. Indeed the record shows that this trial judge meticulously computed the time Pearce had served in jail in order to give him full credit for that time.²

The Court justifies affirming the release of Pearce in this language:

"In order to assure the absence of such a motivation we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is

² At the time of sentencing after Pearce's second trial, the judge stated:

"It is the intention of this Court to give the defendant a sentence of fifteen years in the State Prison; however, it appears to the Court from the records available from the Prison Department that the defendant has served 6 years, 6 months and 17 days flat and gain time combined, and the Court in passing sentence in this case is taking into consideration the time already served by the defendant. IT IS THE JUDGMENT of this Court that the defendant be confined to the State's Prison for a period of eight years."

based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal." *Ante*, at 14.

Of course nothing in the Due Process Clause grants this Court any such power as it is using here. Punishment based on the impermissible motivation described by the Court is, as I have said, clearly unconstitutional, and courts must of course set aside the punishment if they find, by the normal judicial process of fact-finding, that such a motivation exists. But beyond this, the courts are not vested with any general power to prescribe particular devices "in order to assure the absence of such a motivation." Numerous different mechanisms could be thought of, any one of which would serve this function. Yet the Court does not explain why the particular detailed procedure spelled out in this case is *constitutionally* required, while other remedial devices are not. This is pure legislation if there ever was legislation.

I have no doubt about the power of Congress to enact such legislation under § 5 of the Fourteenth Amendment, which reads:

"The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

But should Congress enact what the Court has here enacted, a requirement that state courts articulate their reasons for imposing particular sentences, it would still be legislation only, and Congress could repeal it. In fact, since this is only a rule supplementing the Fourteenth Amendment, the Court itself might be willing to accept congressional substitutes for this supposedly "constitutional" rule which this Court today enacts. So despite the fact that the Court says that the judge's reasons "must be made part of the record, so that the

constitutional legitimacy of the increased sentence may be fully reviewed on appeal," I remain unconvinced that this Court can legitimately add any additional commands to the Fourteenth or any other Amendment.

Apart from this, the possibility that judicial action will be prompted by impermissible motives is a particularly poor reason for holding that detailed rules of procedure are constitutionally binding in every state and federal prosecution. The danger of improper motivation is of course ever present. A judge *might* impose a specially severe penalty solely because of a defendant's race, religion, or political views. He *might* impose a specially severe penalty because a defendant exercised his right to counsel, or insisted on a trial by jury, or even because the defendant refused to admit his guilt and insisted on any particular kind of trial. In all these instances any additional punishment would of course be, for the reasons I have stated, flagrantly unconstitutional. But it has never previously been suggested by this Court that "[i]n order to assure the absence of such a motivation," this Court could, as a matter of constitutional law, direct all trial judges to spell out in detail their reasons for setting a particular sentence, making their reasons "affirmatively appear," and basing these reasons on "objective information concerning identifiable conduct." Nor has this Court ever previously suggested in connection with sentencing that "the factual data . . . must be made part of the record." On the contrary, we spelled out in some detail in *Williams v. New York*, 337 U. S. 241 (1949), our reasons for refusing to subject the sentencing process to any such limitations, which might hamstring modern penological reforms, and the Court has, until today, continued to reaffirm that decision. See, e. g., *Specht v. Patterson*, 386 U. S. 605 (1967). There are a whole variety of perfectly legitimate reasons that a judge might have for imposing a higher sentence.

For instance, take the case of respondent Rice. Without a lawyer, he pleaded guilty to four charges of burglary and received a sentence of only 10 years. Although not shown by the record, what happened is not difficult to see. It is common knowledge that prosecutors frequently trade with defendants and agree to give them low sentences in return for pleas of guilty. Judges frequently accept such agreements without carefully scrutinizing the record of the defendant. One needs little imagination to infer that Rice's original sentence was the result of precisely such a practice. This explains both the first 10-year sentence and the fact that, after a full trial and examination of the entire record, the trial judge concluded that a 25-year sentence was called for. The Court's opinion today will—unfortunately, I think, for defendants—throw stumbling blocks in the way of their making similar beneficial agreements in the future. Moreover, the Court's opinion may hereafter cause judges to impose heavier sentences on defendants in order to preserve their lawfully authorized discretion should defendants win reversals of their original convictions.

I would firmly adhere to the *Williams* principle of leaving the judges free to exercise their discretion in sentencing. I would accept the finding of fact made by the Federal District Judge in No. 418, that the higher sentence imposed on respondent Rice was motivated by constitutionally impermissible considerations. But I would not go further and promulgate detailed rules of procedure as a matter of constitutional law, and since there is no finding of actually improper motivation in No. 413, I would reverse the judgment of the Court of Appeals in that case and reinstate the second sentence imposed upon respondent Pearce.

One last thought. There are some who say that there is nothing but a semantic difference between my view—that the Due Process Clause guarantees only that per-

sons must be tried pursuant to the Constitution and laws passed under it—and the opposing view—that the Constitution grants judges power to decide constitutionality on the basis of their own concepts of fairness, justice, or “the Anglo-American legal heritage.” *Sniadach v. Family Finance Corp.*, ante, at — (HARLAN, J., concurring). But in this case and elsewhere, as I see it, the difference between these views comes to nothing less than the difference between what the Constitution says and means and what the judges from day to day, generation to generation, and century to century, decide is fairest and best for the people. Deciding that an ambiguous or self-contradictory law violates due process is a far cry from holding that a law violates due process because it is “unfair” or “shocking” to a judge or violates “the Anglo-American legal heritage.” A due process criminal trial means a trial in a court, with an independent judge lawfully selected, a jury, a defendant’s lawyer if the defendant wants one, a court with power to issue compulsory process for witnesses, and with all the other guarantees provided by the Constitution and valid laws passed pursuant to it. See, e. g., *Chambers v. Florida*, 309 U. S. 227, 235–237, 240–241 (1940); *Toth v. Quarles*, 350 U. S. 11 (1955). That is the difference for me between our Constitution as written by its Founders and an unwritten constitution to be formulated by judges according to their ideas of fairness on a case-by-case basis. I therefore must dissent from affirmance of the judgment in the case of respondent Pearce.

SUPREME COURT OF THE UNITED STATES

Nos. 413 AND 418.—OCTOBER TERM, 1968.

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Curtis M. Simpson, Warden, Petitioner, 418 v. William S. Rice.	} On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.
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[June 23, 1969.]

MR. JUSTICE HARLAN, concurring in part and dissenting in part.

Were these cases to be judged entirely within the traditional confines of the Due Process Clause of the Fourteenth Amendment, I should, but not without some difficulty, find myself in substantial agreement with the result reached by the Court. However, the Court today, in *Benton v. Maryland*, No. 201, *ante*, at — (1969), has held, over my dissent, that the Double Jeopardy Clause of the Fifth Amendment is made applicable to the States by the Fourteenth Amendment Due Process Clause. While my usual practice is to adhere until the end of Term to views I have expressed in dissent during the Term, I believe I should not proceed in these important cases as if *Benton* had turned out otherwise.

Given *Benton*, it is my view that the decision of this Court in *Green v. United States*, 355 U. S. 184 (1958), from which I dissented at the time, points strongly to the conclusion, also reached by my Brother DOUGLAS, *ante*, at —, that the Double Jeopardy Clause of the Fifth Amendment governs *both* issues presently decided by the Court. Accordingly, I join in Part I of the Court's

opinion, and concur in the result reached in Part II, except in one minor respect.¹

Green v. United States, supra, held in effect that a defendant who is convicted of a lesser offense included in that charged in the original indictment, and who thereafter secures reversal, may be retried only for the lesser included offense. Mr. Justice Frankfurter observed, in a dissent which I joined, that:

"As a practical matter, and on any basis of human values, it is scarcely possible to distinguish a case in which the defendant is convicted of a greater offense from one in which he is convicted of an offense that has the same name as that of which he was previously convicted but carries a significantly [increased] . . . punishment . . ." *Id.*, at 213.

Further reflection a decade later has not changed my view that the two situations cannot be meaningfully distinguished.

Every consideration enunciated by the Court in support of the decision in *Green* applies with equal force to the situation at bar. In each instance, the defendant was once subjected to the risk of receiving a maximum punishment, but it was determined by legal process that he should receive only a specified punishment less than

¹ An outright affirmance in No. 413 would carry the consequence of relieving the respondent Pearce from serving the remaining few months of his perfectly valid original state sentence. See the Court's opinion, *ante*, at 2 and n. 1. There is no basis, whether the result in this case is governed by due process or double jeopardy, for such an interference with the State's legitimate criminal processes. I would therefore vacate the judgment of the Court of Appeals for the Fourth Circuit in No. 413 and remand the case so that an order may be entered releasing Pearce at, but not before, the expiration of his first sentence. Cf. *Peyton v. Rowe*, 391 U. S. 54 (1968).

the maximum. See *id.*, at 190. And the concept or fiction of an "implied acquittal" of the greater offense, *ibid.*, applies equally to the greater sentence: in each case it was determined at the former trial that the defendant or his offense was of a certain limited degree of "badness" or gravity only, and therefore merited only a certain limited punishment. Most significantly, perhaps, in each case a contrary rule would place the defendant considering whether to appeal his conviction in the same "incredible dilemma" and confront him with the same "desperate choice." *Id.*, at 193. His decision whether or not to appeal would be burdened by the consideration that success,² followed by retrial and conviction, might place him in a far worse position than if he remained silent and suffered what seemed to him an unjust punishment.³ In terms of *Green*, that the imposition of a more severe sentence on retrial is a matter of pure *chance*, rather than the result of purposeful retaliation for having taken an appeal, renders the choice no less "desperate."

If, as a matter of policy and practicality, the imposition of an increased sentence on retrial has the same consequences whether effected in the guise of an increase in the degree of offense or an augmentation of punishment, what other factors render one route forbidden and the other permissible under the Double Jeopardy Clause? It cannot be that the provision does not comprehend "sentences"—as distinguished from "offenses"—for it has long been established that once a

² A prohibition against enhanced punishment on retrial does not, of course, tend in any manner to encourage frivolous appeals. A contrary rule does not discourage frivolous appeals, except insofar as it discourages *all* appeals.

³ The would-be appellant's quandary is most clearly seen when the first trial and conviction for a capital offense results in a sentence of life imprisonment. Cf., e. g., *Green v. United States*, *supra*.

prisoner commences service of sentence, the Clause prevents a court from vacating the sentence and then imposing a greater one. See *United States v. Benz*, 282 U. S. 304, 306-307 (1931); *Ex parte Lange*, 18 Wall. 163, 168, 173 (1873).

The Court does not suggest otherwise,⁴ but in its view, apparently, when the conviction itself and not merely the consequent sentence has been set aside, or when either has been set aside at the defendant's behest,⁵ the "slate has been wiped clean," *ante*, at 9, and the Double Jeopardy Clause presents no bar to the imposition of a sentence greater than that originally imposed. In support of this proposition, the Court relies chiefly on two cases, *Stroud v. United States*, 251 U. S. 15 (1919), and *United States v. Ball*, 163 U. S. 662 (1896). I do not believe that either of these cases provides an adequate basis for the Court's seemingly incongruous conclusion.

⁴ Indeed, the Court relies on these cases in Part I of its opinion to hold that a prisoner must be afforded credit for time served pursuant to a subsequently vacated sentence.

⁵ Neither *Lange* nor *Benz* indicates that the principle prohibiting the imposition of an enhanced sentence on the same judgment of conviction depends on whether the original sentence is vacated on the prisoner's application, or is set aside *sua sponte* by the court. (It appears, though not clearly, that *Lange's* sentence was set aside at his behest.)

In *Murphy v. Massachusetts*, 177 U. S. 155 (1900), however, the Court indicated that one who successfully moves to vacate his sentence occupies "the same position as if he had sued out his writ of error on the day he was first sentenced, and the mere fact that by reason of his delay in doing so he had served a portion of the erroneous sentence could not entitle him to assert that he was being twice punished." *Id.*, at 161-162. Thus, the Court concluded in *Murphy* not only that the sentence could be augmented, but that the petitioner was not constitutionally entitled to any credit for time served under the first sentence.

This proves too much, as the Court today holds in Part I of its opinion. In my view, neither conclusion survives *Green*.

Stroud v. United States, supra, held that a defendant who received a life sentence for first degree murder could, upon securing a reversal of the conviction, be retried for first degree murder and sentenced to death. However, the opinion does not explicitly advert to the question whether the Double Jeopardy Clause bars the imposition of an increased punishment, and an examination of the briefs in that case confirms the doubt expressed by the Court of Appeals in *Patton v. North Carolina*, 381 F. 2d 636, 644 (1967), whether this question was squarely presented to the Court.* Assuming that *Stroud* stood for the proposition which the majority attributes to it, that decision simply cannot be squared with the subsequent decision in *Green v. United States*, 355 U. S. 184 (1958). See, *id.*, at 213; *People v. Henderson*, 60 Cal. 2d 482, 386 P. 2d 677 (1963).

The Court does not rest solely on this ambiguous and doubtful precedent, however. Its main point seems to be that to limit the punishment on retrial to that imposed at the former trial "would be to cast doubt upon the whole validity of the basic principle enunciated in *United States v. Ball*," 163 U. S. 662 (1896), and its progeny. *Ante*, at 9-10.

Ball held, simply, that a defendant who succeeds in getting his first conviction set aside may thereafter be retried for the same offense of which he was formerly convicted. This is, indeed, a fundamental doctrine in our criminal jurisprudence, and I would be the last to

* *Stroud* pitched his double jeopardy claim on the theory that, although "the constitutional provision does not prevent a second trial after reversal in *non-capital* cases," it does—without reference to the sentence imposed—preclude "a second trial upon reversal of a conviction in a *capital case*." Brief for Plaintiff in Error, p. 32. *Stroud's* argument as to the enhanced sentence appears based solely on nonconstitutional grounds. See *id.*, at p. 89 *et seq.*

undermine it. But *Ball* does not speak to the question of what *punishment* may be imposed on retrial. I entirely fail to understand the Court's suggestion, unless it assumes that *Ball* must stand or fall on the question-begging notion that, to quote the majority today, "the original conviction has, at the defendant's behest, been wholly nullified and the slate wiped clean." *Ante*, at 9.

In relying on this conceptual fiction, the majority forgets that *Green v. United States*, *supra*, prohibits the imposition of an increased punishment on retrial precisely *because* convictions are usually set aside only at the defendant's behest, and not in spite of that fact. 355 U. S., at 193-194; *supra*, at 3: the defendant's choice to appeal an erroneous conviction is protected by the rule that he may not again be placed in jeopardy of suffering the greater punishment not imposed at the first trial. Moreover, in its exaltation of form over substance and policy, the Court misconceives, I think, the essential principle of *Ball* itself:

"While different theories have been advanced to support the permissibility of retrial, of greater importance than the conceptual abstractions employed to explain the *Ball* principle are the implications of

⁷ This fiction would seem to lead to a result which even the majority might have difficulty reconciling with the Double Jeopardy Clause's prohibition of multiple punishment. Consider the situation of a defendant who successfully vacates a conviction and is then retried and convicted after he has fully served the sentence first imposed. See *Street v. New York*, 395 U. S. — (1969); *Sibron v. New York*, 392 U. S. 40 (1968); *Ginsberg v. New York*, 390 U. S. 629 (1968): Although the sentence was fully served, the defendant himself has caused the judgment to be vacated, and the majority's "nullification" principle would seem to allow the judge to impose a new sentence of imprisonment on him—so long as the new sentence was an "increased" sentence rather than the result of the court's failure to "credit" the defendant with the sentence he had completed.

that principle for the sound administration of justice. Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction." *United States v. Tateo*, 377 U. S. 436, 466 (1964).

To be sure, this societal interest is compromised to a degree if the second judge is forbidden to impose a greater punishment on retrial than was meted out at the first trial. For example, new facts may develop between the first and second trial which would, as an initial matter, be considered in aggravation of sentence. By the same token, however, the prosecutor who was able to prove only second degree murder at the former trial might improve his case in the interim and acquire sufficient evidence to prove murder in the first degree. In either instance, if one views the second trial in a vacuum, the defendant has received less punishment than is his due. But in both cases, the compromise is designed to protect other societal interests, and it is, after *Green*, a compromise compelled by the Double Jeopardy Clause.⁸

⁸ That the new facts may consist of misdeeds committed by the defendant since the first trial, rather than prior misconduct only subsequently discovered, should not, in my view, alter the outcome under *Green* and the other double jeopardy cases. If subsequent misdeeds amount to criminal violations, the defendant may properly be tried and punished for them. If they amount to something less, the very uncertainty as to what kinds of noncriminal conduct may be considered in aggravation of the sentence on retrial would, analytically, seem to thwart the concerns protected by *Green*. In either event, I do not understand what rational policy distinguishes a defendant whose appeal is successful from one who takes no appeal

I therefore conclude that, consistent with the Fifth Amendment, a defendant who has once been convicted and sentenced to a particular punishment may not on retrial be placed again in jeopardy of receiving a greater punishment than was first imposed. Because the Double Jeopardy Clause has now been held applicable to the States, *Benton v. Maryland*, *supra*, I would affirm the judgment of the Court of Appeals in No. 418, and vacate and remand in No. 413, so that respondent Pearce may finish serving his first, valid sentence. See n. 1, *supra*.

and whose sentence may not, consistent with the Double Jeopardy Clause, be augmented. See *supra*, 3-4.

Of course, nothing in the Double Jeopardy Clause forbids a prosecutor from introducing new and harmful evidence at the second trial in order to improve his chances of obtaining a conviction for the lesser offense of which the defendant was previously convicted or to assure that the defendant receives the full punishment imposed at the first trial.

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418 v.		
William S. Rice.		

[June 23, 1969.]

MR. JUSTICE WHITE, concurring in part.

I join the Court's opinion except that in my view Part II-C should authorize an increased sentence on retrial based on any objective, identifiable factual data not known to the trial judge at the time of the original sentencing proceeding.